A

BRIEF EXPOSITION

OF THE

LAWS

RELATIVE TO

WILLS and TESTAMENTS.

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WILLS and TESTAMENTS.

BY A BARRISTER AT LAW.

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The case of Bona notabilia is not mentioned in this Treatise.

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PREFACE.

THE following Work is addreſſed more particularly to two claſſes of people—thoſe who through obſtinacy will not, and thoſe who in emergent caſes cannot, apply to Gentlemen of the Profeſſion on making their Wills.—The former it may tend to ſhew the ſlipperineſs of the ground on which they tread, and to the latter I will hope it may afford ſome uſeful aſſiſtance. Further than this, I do not deſpair of this little Work being occaſionally a convenient Pocket-Companion to Country Practitioners, who are often called to a diſtance from home to make the Wills of perſons labouring under dangerous complaints, and to whom a more bulky Book might be troubleſome.

After the very great number of diſtinct treatiſes on the ſubject of Wills which the public is already in poſſeſſion of, I perhaps may not eſcape a charge of folly or of arrogance—I have only this to ſay in my defence: The larger works on the ſubject are not likely to come into the hands of thoſe for whom this Treatiſe is intended, and of the ſmaller I ſhall not ſcruple to ſay they are for the moſt part inadequate to any uſeful purpoſe whatever.—To diſmiſs them

them in a ſentence, they exhibit a mere crude collection of caſes, on ſome very few and very obvious topics. Whether I have done more or better than my predeceſſors, it is for the public to determine. I may ſay, without breach of modeſty, I have aimed at avoiding their faults—I do not aſſert that I have obtained my aim.

For the purpoſe of eaſy reference, I have throughout placed the ſubject treated on in large letters at the top of each page, and the diviſions of the ſubject in marginal notes—on this account a ſhort index will, I believe, be all that is neceſſary—on referring to the ſubject, and turning the eye along the ſide of two or three pages, the Reader will be able to diſcover the contents of the Book.

I have introduced into this Work a Chapter on Powers of Appointing—but as this ſubject is common to Wills and other conveyances, and is not uſually much conſidered in Works of this ſort, I have thrown it into the form of an Appendix.

Of the Precedents added at the end I have a few words to ſay. I have confined myſelf almoſt entirely to diſpoſitions inveſtigated in the Book, and have been ſolicitous of uſing the ſhorteſt forms, expreſſed in the plaineſt language poſſible. By this means I have hoped to enable a Teſ-

a Teſtator to do ſomething for himſelf beyond what a few precedents can do for him. Poſſeſſing one or two forms expreſſing a certain ſort of diſpoſition, and alſo ſome few caſes and a little argumentative inveſtigation of that ſort of diſpoſition, he may perhaps be enabled to accommodate the precedent to his own particular caſe and views; in this I think the avoiding technical language and technical forms will greatly aſſiſt him: to alter or add to a deviſe contained in familiar language may not be difficult—but what perſon out of the Profeſſion could new-model a deviſe contained in technical terms? what it would be ſafe to take away he would not readily know—ſtill leſs would he be able to fill up the chaſm with any bearable uniformity of language. I need not hint the danger that ariſes from uſing technical expreſſions by thoſe who do not fully know their import.

I have added a Table of Caſes referred to or cited, as I never yet read a Law Book without wiſhing for one where it was not, and finding it uſeful where it was.

WILL

WILL AND TESTAMENT.

A WILL more properly relates to Real property, a Teſtament to Perſonal, Co. Lit. 111. a.—According to Swinburn, P. 3, it is a Will when an Executor is appointed, otherwiſe a Teſtament. However this may be, the words are uſed *looſely*, and it is uſual in all caſes to ſay, I A. B. do make this my laſt Will and Teſtament.

WILLS.

Nuncupative or unwritten do not extend to real property; they are regulated and reſtrained by the St. 29. Ch. 2d. c. 8.

Sec. 19. Where the property bequeathed amounts to upwards of 30l. the deviſe muſt be proved by the oaths of three perſons preſent at the making of it. It muſt be proved that the teſtator, at the making or pronouncing the deviſe, deſired ſome perſon preſent to bear witneſs that ſuch was his Will, or to that effect.—Such Nuncupative Will muſt be made in a laſt ſickneſs, in his own place of reſidence, or where he has been reſident ten days next before making the Will; except where a perſon is taken ſick, being from his own home, and dies before return.—Sec. 20. After ſix months paſſed from the ſpeaking teſtamentary words, no evidence of them ſhall be admitted, unleſs the ſubſtance

of them was put down in writing within ſix days of their being ſpoken.—Sect. 21. A Nuncupative Will ſhall not be proved till fourteen days after the teſtator's deceaſe, and until notice to the widow or next of kin, that they may conteſt the ſame.—Sect. 23. The Nuncupative Wills of ſoldiers, ſailors, and marines, in actual ſervice, are not affected by this Act.

WILLS WRITTEN.

St. 29. Ch. 2. c. 3.—Sec. 5. All deviſes of lands and tenements deviſable by force of the ſtatute of wills, or by particular cuſtoms, or by this ſtatute, ſhall be in writing, and ſigned by the deviſor, or ſome perſon in his preſence, and by his expreſs direction, and ſhall be atteſted in his preſence by three witneſſes. Hence it appears that the teſtator need not actually ſign his Will in preſence of the witneſſes; if in their preſence he acknowledges a ſigning, it is ſufficient, Grayſon and Atkinſon, 2 Veſey 454. But the three witneſſes muſt actually ſign their names in the preſence of the teſtator.

The following execution may or may not be valid.

"In witneſs whereof I the above-men-
"tioned John Doe have hereunto ſet my
"hand and ſeal this, &c. &c.

"JOHN DOE."

"Signed,

" Signed, ſealed, &c. by the above-men-
" tioned John Doe, in our preſence,

" RICHARD ROE,
" JOHN DEN,
" RICHARD FEN."

This is the caſe of Hands and James, Com. R. 531. Eaſter 9. G. 2d. in which the defendant made claim under a Will thus executed; it was left to the jury to ſay whether in fact the witneſſes had ſigned in preſence of the teſtator. The jury found that in fact the witneſſes had ſo done. The witneſſes were all dead, and a preſumption on which the jury went was, that one of the witneſſes was an attorney of good character, ſo probably would underſtand what ought to be done. Now if he had known what ought to have been done, he moſt likely would further have known how to expreſs the doing of what the ſtatute required.

No relief in Chancery where there is not due execution.

Chancery will grant no relief where witneſſes omit to ſign in the teſtator's preſence. *See Croft and Pawlet, 2d Str.* 1109.

Reference to prior writings.

But reference to prior writings, not ſigned according to the ſtatute, is in many caſes good, 4 Bro. 383. per Wilſon Juſtice. A. deviſed ſuch annuities and rent charges as were contained in certain writings, and it was held good: but it would not have been ſo if he had referred to words, " As it ought

to be a Will in writing for all." Cro. J. 145. Molyneux and Molyneux, and in Brady and Cubitt, Douglaſs 31. a reference was made to a book in which the teſtator had expreſſed the purpoſes to which he intended a part of his eſtate ſhould be applied, and it was adjudged that the truſts ſhould be according to that book. But reference to an *after-writing* is not good; for which ſee the caſe of Habergham and Vencent, reported 5 T. R. 92. and 4 Bro. 352. 2d Veſey, junior, 204. A. made a Will, and referred as to ſome uſes to a deed which he intended to make, and which was made and ſigned by two witneſſes, and it was decreed that the deed was not valid to eſtabliſh the uſes; to have determined otherwiſe, would have been to defeat the ſtatute; for a man would merely have to execute a general deviſe to ſuch uſes as he ſhould in writing appoint, and then any careleſs writing would ſuffice.

Reference to after-writings.

Rule relaxed as to debts and legacies.

However the ſtrictneſs of the rule is relaxed in one or two caſes; debts contracted after a Will charging lands with debts, ſhall be diſcharged out of the lands. Alſo if the Will is duly executed to paſs real eſtate, and that real eſtate is made chargeable with legacies, legacies given afterwards in an unatteſted Codicil ſhall be charged on the land. Maſter and Maſters, 1 Wm. 423. Brudenell and Boughton, 2 Atk. 274. Reay and Hopper, before Lord Kenyon at Rolls, 10th March, 1785, cited 5 T. R. 94, 95. Jackſon and Jackſon,

Jackſon, before Buller Juſtice, June 23, 1788—reported in note to 5 Ed. Wm. R. v. 1. p. 423. n. 3.

WHO MAY DEVISE REAL PROPERTY.

The diſtinction betwixt real and perſonal property, is in general ſufficiently well known. All freehold intereſts in lands, rent charges, &c. are eſteemed real property. Terms for years in land, goods, money, debts, &c. are conſidered as perſonal property.—See the 2d and 24th Ch. of the 2d Volume of Blackſtone's Commentaries.

Real property, what

By St. 32. H. 8. Ch. 1. all perſons may deviſe their lands, &c. but

WHO MAY NOT.

St. 34. and 5. of H. 8. ch. 5. ſec. 14. Reſtrains, or rather explains the above Act, and ſays, that no perſons within 21 years of age, women married, idiots, or perſons of nonſane memory, ſhall deviſe their lands, &c. With regard to idiots and perſons of inſane memory, this clauſe is in full force. (In order to be of ſound or diſpoſing mind, more is neceſſary than that the teſtator ſhould be able to count twenty, name thoſe that are about him, &c. He ſhould be capable to comprehend all his ſocial relations, of father, huſband, brother, &c.—"By law it is not ſufficient that teſtator, at the time of making his

Infants, married women, idiots, &c.

What is a found mind

his will, be able to give an anſwer to uſual and familiar queſtions—he ought to have a diſpoſing memory, ſo that he is able to deviſe his property, with reaſon and intelligence; and it is this memory, which the law calls ſound and perfect memory, 6 Co. 23. a. Marquis of Wincheſter's caſe.) As to infants and femes coverts it is not ſo, for in ſome places, by cuſtom, infants and married women may deviſe, Harg. Co. Lit. 111. b. n. 4.

Deviſes by particular cuſtoms.

As to married women, the ſtatute may in all caſes be evaded, 1ſt, By conveying the legal eſtate to truſtees prior to marriage, in which caſe, by writing in nature of a Will, and executed as one, the wife may deviſe her real property, Southby and Stonehouſe. 2. Veſ 612, 2 Bro 5, 34, and even by agreement with the huſband prior to marriage, the appointment of a married woman has been held good, without a conveyance of the legal eſtate to truſtees, 6 Bro. P. C. 15 b. Wright and Cadogan—ſee 2d T. R. 695.—In caſe nothing has been done prior to marriage, the huſband and wife may join in levying a fine of the wife's eſtate, to ſuch uſes as ſhe ſhall by will appoint, Com. Dig. Fines, B. As to copyholds, the huſband and wife may ſurrender (the wife being firſt privately examined by the ſteward, or by two copyholders if the cuſtom permit, Cro. El. 717. Eriſh and Rives.) the wife's copyholds, to ſuch uſes as ſhe ſhall by Will appoint,

Evaſions of the Statute by married women.

By a truſt.

By a fine.

Wife's deviſe of copyholds.

point, Littleton's R. 274. 1 Veſ. 229. Taylor and Phillips.

Fraud and fear are reaſons for ſetting aſide a Will—Hacker and Newborn Style, 427. The wife, by importunity, got her huſband, when in ſickneſs, to make his Will—This he did, merely that he might be quiet—It was adjudged to be made under reſtraint, and ſo no Will—Swinb. 239. 4 Burn Ecc. L. 53, &c. Wills void for fear and fraud.

WHO MAY DEVISE PERSONALTY.

In general all perſons of full age and ſound mind, except married women.—Even infants may deviſe perſonalty, when at years of diſcretion, (but what ſhall be eſteemed years of diſcretion is not ſo clear, 2d Blackſ. Com. Males at 14, females at 12; but ſtill their diſcretion ſhall be taken into conſideration, and if found deficient, the Will ſhall be overthrown. Perkins, § 503. ſays, 4 years old—Lord Coke, H. Co. L. 89. b. 18 years old—17 Hearle and Greenbank, 1ſt Veſey 303, 1 Vern. 255—15 for males, 2d Vern. 469.—Dub. if before 21, 1ſt Vern. 326. Hargrave, in n. b. Co. L. 89. b. coincides with Blackſtone.) Alien friends — Alien enemies, by the King's ſpecial favour, 1 Bl. Com. 372—3. Infants, when.

WHO MAY NOT DEVISE PERSONALTY.

Married women; yet here, as well as in caſe of real property, a married woman may, in When married women may.

in certain circumſtances, diſpoſe of her property by a ſort of Will—without the conſent of her huſband—in caſe of property reſerved to her ſeparate uſe, and the ſavings thereon, Fettiplace and Gorges, 3 Bro. 8. Herbert and Herbert, Pre. Ch. 44. 2 Bl. Com. 498. Alſo without his conſent, ſhe may deviſe what ſhe has as executrix to another—provided her Will is but a conveyance of her truſt to another perſon, and provided that ſhe ſhall not wrong her huſband, by deviſing what ſhe has as legatee, for that is *not* deviſed to her in truſt, and belongs to her huſband—4 Burn. Ecc. Law, 52—3—Swinb. 49, 50. With the huſband's conſent. If the huſband, before marriage, agree that his wife may make a Will, and deviſe all or any part of her goods, her Will of ſuch goods is valid as an appointment, Anon. 1. Mod. 211. 2 Black. Com. 497. The wife may make a teſtament with her huſband's conſent, tho' no power ſo to do be reſerved before marriage; but *this* conſent it ſhould ſeem is revocable, 5 Bac. Abr. 502. Swinb. 48.

Who not, for crimes.

Various deſcriptions of perſons are prohibited diſpoſing of their perſonalty, on account of criminal conduct.—Traitors and felons from the time of conviction—Felo de ſe, or perſon committing ſuicide—for his goods are forfeited — Outlaws, for their goods are forfeited to the King during the Outlawry, 2d Bl. Com. 499. Whether a perſon excommunicated may make a teſta-

Excommunicate may.

ment

ment is a point I have not found actually decided—In Mitford and Herbert, 9 mod. 113. The counsel on both sides *arguendo*, (it suited their argument) mention such persons as incapable of devising personalty—but the court did not notice the position—Swinb. 60. a. "The affirmative hath more patrons in number, and those of greater weight—except the cause of excommunication be usury, or heresy, or other cause for which it is prohibited to make any testament—or unless the person be excommunicate, with the great curse Anathema."—Dr. Burn, 4. Ecc. L. 57. does little more than cite this passage out of Swinburne, Went. off. ex. 16. Leans to the affirmative.

When we consider how numerous and how trivial are the causes for which a sentence of excommunication may be pronounced, there seems no reason whatever to doubt that a refusal of the Ecc. Courts to substantiate a Will, on account of the testator's being excommunicate, would one way or other be immediately and effectually resisted.

WHAT MAY BE DEVISED.

The St. 32. H. VIII. S. 2d. says, all persons *having lands* may devise: Therefore, if a man devise lands which he intends to purchase, and afterwards purchases them, they do not pass by his Will, for he had them

Not after-purchased lands.

not when he made it—Bunter and Coke, 1 Sal. 238.

Lands agreed for may.

But it is otherwiſe if a man has entered into articles for the purchaſe of lands, and deviſes them before they are aſſigned to him, Potter and Potter, 1 Veſey, 437. 2 Vern. 679.

A Great Authority denies this origin of the incapacity to deviſe after-purchaſed lands. It is ſaid that a Will is a *conveyance*, and on *this* account after-purchaſed lands cannot paſs. But if this were the origin of the rule in queſtion, would not equity decree a ſpecific performance againſt the heir? Windham and Chetwind, Burrow, 427, and cited in Blackſtone's Argument, Harg. L. Tr. 503.

Eſcheating tenancy.

If a manor in poſſeſſion is deviſed, and afterwards a tenancy eſcheats, it will paſs as incident to the manor, 1 Sal. 238. Bunter and Coke. A. is diſſeiſed, then deviſes the land, then enters, it paſſes by the deviſe, for his entry reinſtates him from the beginning,

Equity of redemption

1 Sal. 237. Equity of redemption, i. e. the intereſt the mortgagor has in lands, after the legal eſtate has become abſolute in the mortgagee, is deviſeable, 2 Ch. Ca. 8.

Remainders. Contingencies.

Anonymous. A remainder after an eſtate for life may be deviſed. Contingent and executory intereſt, both in chattels and real property, are deviſeable, 4th Fearne's Contingent Remainder, 537 to 546.

Yet

Yet it is not *bare poſſibilities* that are deviſeable. The ſon cannot deviſe the eſtate which *may* deſcend from his father; nor the legatee the legacy which poſſibly may be left to him and his executors,* 3 T. R. 88. *Theſe* are merely hopes of ſucceſſion.—C. deviſed to his ſon in fee, and if his ſon died before 21, to R. R. deviſed this poſſibility, and the deviſe was ſupported, Moor and Hawkins, cited Bl. R. C. P. 33—4. Now R. in this caſe ſtands very differently from an heir at law. He has been directly pointed out for a future intereſt. But when the future intereſt is not aſcertained to any certain perſon it is not deviſeable, as "a remainder to the heirs of A." who is living. Now A. when alive, can have no heir; and if a perſon who perchance may be heir to A. deviſes this poſſibility; it is not good, for the uncertainty of his anſwering the deſcription of the deviſee, 4th Fearne, 546.

Bare poſſibilities not.

WHAT NOT.

Copyholds. The St. H. VIII. enabling perſons having lands to deviſe them, does not extend to copyholds. Therefore, if any one wiſhes to deviſe his copyholds, he muſt firſt ſurrender them to the uſe of his Will,

* Beckley and Newland, 2d Wm. 182. A. and B. married ſiſters, preſumptive heireſſes of C. who was a man of fluctuating intentions. A. and B. agreed to divide all C. ſhould leave them, i. e. each to take half of all left, however teſtator bequeathed it.—Ld. Chancellor Macclesfield eſtabliſhed the agreement, and A. who had a very ſmall bequeſt, received equally with B. who had a large one.

and his Will acts as an appointment, Harg. Co. L. 111. b. n. 1. In some cases this surrender will be supplied by a court of equity, as for younger children where the eldest is provided for, 3 Bro. 288. Pike and White. For creditors, 3 Sal. 84. Pope and Garland. For a wife, who had a life-interest devised, with remainder to testator's nephews, (tho' as to the nephews the devise was held void for want of a surrender) Marston and Gowan, 3 Bro. 170. In Wardel and Wardel, 3 Bro. 116. Testator, taking notice that he had *not* surrendered his copyholds, directed that his son (to whom they would descend as heir at law) should pass sufficient surrenders when he came of age, to such and such persons, otherwise an estate tail devised him should go over as if he were dead without issue. The heir was decreed to convey according to his father's intentions.

Surrender supplied by equity, where.

Where the legal estate of the copyhold is not in the devisor, no surrender is necessary. This happpens when the copyhold is vested in trustees for the use of the devisor, or when it is mortgaged so that the mortgagees hold the legal estate, Macnamara and Jones, 1 Bro. 481. Tho' where the legal estate is in the devisor, a surrender will, in particular circumstances, be supplied by Chancery, yet it is most prudent not trust to this, 1st. for the uncertainty whether, in the particular circumstances of the Will, this relief will be afforded; 2d. becaufe the inveftiga-

No surrender of trusts in copyhold necessary.

Dangerous not to surrender.

tion

tion of the circumſtances will give riſe to tedious and expenſive litigation.

Intereſts held in joint tenancy, for the ſurvivor takes the whole; and this principle holds equally in real and perſonal property, Co. L. 185. b. Swinb. 92.—The requiſites to make a joint tenancy are theſe: One and the ſame intereſt ariſing from one and the ſame conveyance, commencing at one and the ſame time, and held by one and the ſame undivided poſſeſſion, 2d Black. Comm. 180. So if A. grants or deviſes to B. and C. they are joint tenants, Litt. Sec. 277. If a horſe is given to ſeveral, they are joint tenants: So it is if a bond is made to two or more, Littleton, Sec. 282—283. Executors are joint tenants, and the whole reſidue goes to the ſurvivor, if means have not been taken to ſever the jointure, Balwyn and Johnſon, 3 Bro. 455. Joint tenancy was formerly favoured by the courts; it is not ſo now, 1 Veſey, 166.—This evil of joint tenancy may be remedied, and the property be made deviſeable, by ſevering the jointure, the proper methods of doing which do not come within the object of this work. But it is to be obſerved, that if a joint intereſt in lands is deviſed, and then the jointure is ſevered, the Will is void as to this deviſe, 3 Burr. 1488, Swift and Roberts, Amb. 617. S. C.—It is to be obſerved, that undivided poſſeſſion is not neceſſarily accompanied by joint tenancy; for both with regard to real and perſonal property, apt words will create a tenancy Joint tenancy.

nancy in common, where there is no ſurvivorſhip; and for the encouragement of huſbandry and trade, joint ſtocks relative to them ſhall be conſidered as held in common, Co. L. 182. a. 2 Bl. Com. 399.

Wife's Choſes in action.

The huſband cannot deviſe the chattels, real or *choſes*, in action of his wife; for if the wife ſurvive, ſhe (and not the huſband's executor) ſhall have them.

Choſes in action, what.

A choſe in action is property not in poſſeſſion, but which may be recovered by a ſuit at law: So a bond is a choſe in action: The money due on it is not in poſſeſſion of *obligee*, or him to whom the bond is made, but by an action he may reduce it into poſſeſſion. If a man covenants with me and fails, the damages ariſing from his failure are juſtly my due; but till I have recovered them, they are choſes in action, 2 Bl. Com. 397. But if the huſband reduce the choſes in action into poſſeſſion, or diſpoſe of a chattel real, (i. e. a leaſe) then he has obtained complete ownerſhip, 2 Bl. Com. 434—5. The huſband may by certain methods become a *purchaſer* of his wife's choſes in action, without reducing them into poſſeſſion. If before marriage he make a ſettlement on his wife, in conſidera tion of what ſhe is or may be entitled to, this is a purchaſe of her choſes in action, &c. Garforth and Bradley, 2 Veſey, 677. If the ſettlement is in conſideration of her preſent fortune, it is no purchaſe of her future choſes in action by the huſband, ib. Where

But may when reduced into poſſeſſion.

Purchaſed by the huſband.

a

a ſettlement is made equivalent to the wife's fortune, tho' there be no ſpecific agreement or mention of her choſes in action, yet the huſband ſhall be deemed a purchaſer of them, Eq. Ca. Abr. 69. 2 Vern. 501.—See Butler's note, 14th Co. L. 351. a.

Emblements are deviſeable, 8 Vin. Abr. deviſe, I. 5. Emblements are ſuch produce of land as requires annual care and renewal, as hemp, flax, corn; and every one who hath an uncertain intereſt in lands, ſhall have the emblements, provided he do not determine his intereſt by his own default, Co. L. 55. b. Emblements deviſeable.

The executor of tenant for life, or leſſee for years of tenant for life, ſhall have the emblements; i. e. if tenant for life has ſown the lands and dies, or his leſſee has ſown the lands, the executor in one caſe, and the leſſee in the other, ſhall have the crop, Co. L. 55. b. 1 Rol. 727. L. 11. 15. But he who has a fixed period (as a leaſe for 10 years) ſhall not have the emblements, for it was his own folly to ſow, when by the fixed determination of his intereſt he could not expect to reap, Litt. S. 68. If tenant for her widowhood marry, ſhe ſhall not have the emblements, for ſhe hath voluntarily determined her intereſt, Co. L. 55. b. 5 Co. 116. Cro. El. 460. nor leſſee if he ſurrender, 1 Rol. 726. L. 40. From the above definition it is clear that hay, trees, &c. are not emblements, 1 Rol. Ab. 728. Pl. 23, 24, 25. Who ſhall have them. Who not.

The.

The teſtator muſt take care ſufficiently to deſcribe himſelf, that it may at any future period be certainly known whoſe Will it is. In caſe of women, it is proper to ſay, wife, widow, or ſpinſter, preſent and late name, &c. And all perſons ſhould add their trade or profeſſion, place of reſidence, and any other particular which may diſtinguiſh them from others bearing the ſame name. Aſſerting ſoundneſs of mind, bequeathing the ſoul to Almighty God, &c. are needleſs forms.

DESCRIPTION OF DEVISEES.

Great care muſt be taken accurately, to point out the perſons meant to be benefited.

Names of fondneſs or jocularity.

It is not very unuſual for perſons in their Wills to indulge themſelves in ſome name of fondneſs or jocularity, which they have been in the cuſtom of uſing.—This is by no means adviſeable, as it gives riſe to litigation, if the habits of the teſtator are not known to the executor—and it may often happen, that evidence of ſuch modes of miſ-calling perſons is not attainable.

Miſtakes in names.

Miſtakes in chriſtian, or even ſirnames are not fatal, when there is ſufficient evidence who was really meant to be benefited, Beaumont and Fell, 2d Wm. 140. Dowſet and Sweet, Ambl. 175. Bradwin and Harper, Ambl. 374. If a man deviſe to A. eldeſt ſon of B. and C. is really the eldeſt ſon, C. ſhall take for the deſcription, "eldeſt ſon is moſt certain," 3 Leo. 18.—A. deviſe to the ſon and

and daughter of A.—A has four ſons and a daughter, none of the ſons ſhall take any thing, for it does not appear which of them is meant. The whole ſhall go to the daughter—for it is a joint deviſe, and whenever one joint tenant cannot take, his ſhare goes to the other or others, Dowſet and Sweet, Ambl. 175. If a deviſe is, "to all his children," only thoſe ſhall take who were born at the time of making the Will. Northey and Burbage, Pr. Ch. 471. In Elliſon and Aires, 1ſt Veſey, 111. The deviſe was to Elizabeth Paxton, but if ſhe died before 21 or marriage, "to the younger children of Francis Elliſon;" and the Chancellor decreed ſuch of Francis Elliſon's younger children to take, as were in being at Elizabeth Paxton's death, under age.—In this caſe, neither the time of the Will's being made, or the teſtator's death, was conſidered as the determining period—and Lord Chancellor ſaid, no certain rule can be laid down in caſes of this kind, (P. 114). In Attorney General and Criſpin, 1 Bro. 386, Teſtator deviſed 50l. a piece to the children of A. after the death of certain annuitants, and a child born after the teſtator's death was admitted to take. A deviſe to all and every the children of Mary Pulſford, lets in a child, born after teſtator's death, Pulsford and Hunter, 3 Bro. 416. Theſe caſes may ſuffice to ſhew the neceſſity of being explicit, as to the deſignation of the children who are to take.—The addition, "ſuch as are now alive," "ſuch as ſhall be alive at my death," "ſuch children as A.

Children, preſent or future.

has, or may have at any future time," are in the power of any teſtator to add—and by ſuch means he may very eaſily avoid ambiguities, tending in many caſes to defeat his intentions.

Deviſes "amongſt relations," where confined by the ſtatute of diſtribution

There is a mode of deviſing, not very unuſual but very perplexing—it is under various expreſſions, "amongſt relations."—Where this expreſſion, or an equivalent one is uſed, ſimply, without addition, it is conſtrued by the courts to mean next akin, i. e. ſuch perſons as would take, if no Will were made, but excluding the wife, 1 Bro. 32, 33. Green and Howard. In a recent caſe, the deviſe was "to be equally divided amongſt his next akin, ſhare and ſhare alike," and Juſtice Buller, ſitting for Lord Chancellor, determined, that brothers and ſiſters living at the death of teſtator, and nephews and nieces, repreſentatives of thoſe deceaſed, ſhould all take equal ſhares. On a rehearing, Lord Chancellor was inclined to exclude the repreſentatives of deceaſed brothers—but the matter was compromiſed, Phillips and Garth, 3 Bro. 64. In a ſtill later caſe, the deviſe was, "the reſidue to be divided amongſt all my relations, ſhare and ſhare alike;" and Lord Loughborough decreed it a mere inteſtacy, 4 Bro. 207. Maſters and Hooper.

A deviſe was, "amongſt ſuch of my neareſt relations, of the family of Edge, as my executor ſhall think greateſt objects of charity." The Chancellor would not let the bequeſt

bequeſt extend beyond the relations, who could take under the ſtatute of diſtributions, i. e. living brothers and ſiſters, and children of brothers and ſiſters, deceaſed, Edge and Saliſbury, Ambl. 70. So Wedmore and Woodroffe, Ambl. 636. A deviſe, "amongſt the moſt neceſſitous of my relations," was held not to benefit any beyond the degrees marked out by the ſtatute. But in Bennet and Honeywood, Ambl. 708. A deviſe of 20,000l. to executors, to divide amongſt ſuch relations, not worth 2000l. as ſhould apply in two years, and in ſuch proportions as the executors ſhould think fit, was allowed to extend to more diſtant relations than thoſe capable of being benefited by a diſtribution under the ſtatute. From theſe and other caſes, it appears that the Court of Chancery is unwilling, except particular circumſtance ſtrongly require it, to extend a deviſe beyond thoſe relations who would take a diſtributory ſhare under the ſtatute, in caſe of inteſtacy. If the ſtatute is not to be the boundary, what is? There is no other rule founded on any legal analogy, which ſhould exclude even 20th couſins. Were there another rule laid down, the more diſtant relations would be authenticated, by more inquiry and litigation, and are leſs the objects of concern to the teſtator.—In moſt of the caſes, all relations would take alike, i. e. very diſtant ones would be equally benefited with thoſe neareſt and deareſt to teſtator.

Where not.

How to extend the rule.

But we muſt remember under preciſe directions, definitely pointing out the wiſhes of the teſtator, and the means of ſubſtantiating theſe wiſhes, (as in Bennet and Honeywood, ſupra) the rule of Chancery is relaxed; ſo it is where an object is certainly pointed out. As where Joice left money to be divided amongſt her relations, Greenwoods, Everitts, and Downs The Everitts were not within the ſtatutable degree, yet were permitted to take—the caſe is (Greenwood and Greenwood) cited, 1 Bro. 32. in a note. It is not ſaid what Everritts were to take, moſt probably only thoſe in the neareſt degree, as firſt couſins, to the excluſion of ſecond couſins. The reſult of the whole is, that in bequeſts of this kind, the teſtator is not to content himſelf with looſe and general expreſſions, but it behoves him circumſtantially to deſcribe the perſons he means to benefit.

DESCRIPTION OF THING DEVISED REAL.

Such deſcription ſhould be given as may identify the property deviſed, the county, pariſh, manor, name of occupier, of the perſon from whom the land deſcended or was purchaſed, name of the land itſelf, if it has any particular one, whether freehold or copyhold; ſome or all of theſe circumſtances ſhould be enumerated, as the caſe may require.

Attention

Attention is paid in conſtruing deviſes to general introductory words, as where the teſtator ſays, " as touching all ſuch temporal eſtate of lands, goods, and chattels as God hath endowed me with, I give, deviſe, and bequeath thereof as follows," 5 T. R. 13, Goodwright and Stocker.—Lord Kenyon allowed theſe words would have ſome effect in conſtruing the ſubſequent deviſes; yet they were not alone ſufficient to give a fee: So the prefatory words, " all his freehold and leaſehold eſtates he deviſed," carried a fee, Doe and Burrſall, 6 T. R. 34.

Meaning of the term " eſtate."

There is a word uſed in deviſes, which makes conſiderable confuſion—it is " eſtate." The legal meaning of this word is not a local deſcription *of*, but the intereſt *in* lands. My eſtate at or in Blackacre Cloſe, does not mean Blackacre Cloſe itſelf, but my intereſt in it. If I deviſe my eſtate in Blackacre Cloſe, I deviſe my intereſt, all I claim there—and if I have a fee, a fee paſſes. But if I deviſe Blackacre Cloſe, I ſay nothing as to the quantity of intereſt I deviſe, ſo by conſtruction of law, tho' I have a fee, the deviſee only takes for life. But if it appears in a Will, that " eſtate" is uſed, merely as a deſcription of the thing deviſed, it ſhall not then be conſtrued in its technical ſenſe.

Where it means " intereſt."

Two caſes ſeem ſufficient to explain this matter, Holdfaſt and Morton, 1 T. R. 411. A man deviſed h s eſtate at B. to R. and R. took a fee. A. deviſed one third of all his eſtate

eſtate to his wife, and two-thirds of all his eſtate to his ſon and his heirs, and it was held that the wife took only for life. As in his deviſe to his ſon he uſed words of perpetuity tacked to the word eſtate, and in his deviſe to his wife he did not, it was ſuppoſed he uſed the word eſtate not as referring to his intereſt in the property, but as a word of local deſcription, Cheſter and Painter, 2d Wms. 335.

Where local deſcription.

Word land.

The word land is of very extenſive import, and will paſs houſes, woods, &c. Yet if it is apparently the teſtator's deſign, its import ſhall be abridged. As if A. has a houſe and land at B. and a houſe and land at C. and he deviſe his *houſe and land* at B. and his *land* at C.—his houſe at C. ſhall not paſs, becauſe as he gave a particular deſcription in the firſt part of the deviſe, it is to be preſumed he did not intend to uſe the word land in a comprehenſive ſignification, Ewer and Hayden, Cro. El. 476.

Appurtenants.

By the word "appurtenants," things uſually occupied as part of the premiſes will paſs—even land occupied with a houſe, and highly convenient for the uſe of it, 2 Bl. R. 1148.—and the word houſe alone will paſs things occupied with it as proper and convenient, 2 T. R. 489. Doe and Collins. So a garden will paſs by the word houſe, Co. L. 5. b. "I give all to my mother" held not to paſs lands, 1 Lev. 130. Bowman and Milbanke. "I give them all I am worth"

worth" held to paſs lands, Huxtep and Brooman, 1 Bro. 437. All theſe doubts may with the greateſt eaſe be avoided—To A. and his heirs certainly gives a fee—to A. for life as certainly reſtrains the gift.

PUBLICATION AND ATTESTATION.

By the Statute 29, Ch. 2d. S. 5, all deviſes of lands, tenements, and hereditaments, ſhall be in writing, ſigned by the teſtator, or ſome one for him, in his preſence and by his expreſs direction, and ſhall be atteſted or ſubſcribed by three witneſſes at leaſt, *in the preſence of the teſtator.*

If a term is veſted in truſtees to attend the inheritance*, it cannot paſs by a deviſe, unleſs the Will is atteſted in the manner required by the ſtatute as to real eſtate, H. Co. L. 111 b. n. 3. 2d Wms. 236. 1ſt Str. 619. Whitchurch and Whitchurch. 9 mod. 127. 2 Atk. 72. Villiers and Villiers. The teſtator ought, in preſence of the three witneſſes, to take the Will, and ſay he publiſhes it for his laſt Will. But this is not abſolutely neceſſary; for if it is written in the Will, "publiſhed as laſt Will," though the teſtator did not tell the witneſſes it was his Will, this may ſuffice, Peate and Ongley, Com. R. 197. Com. Dig. Dev. E. 2. per Lord Mansfield in Bond and Seawell,

* A term to attend the inheritance differs from other terms for years, inaſmuch as it goes to the heir as heir, and not to the executor as perſonal property, i. e. as a chattel real.

Seawell, 3 Burr. 1775. "It is not neceſſary that the teſtator ſhould declare the inſtrument executed to be his Will," "or that the witneſſes ſhould attest every page or ſheet, or that each page ſhould be ſeparately ſhewn them," ib. Now if it is not neceſſary for the teſtator in words to declare it his Will, it ſhould ſeem that any internal circumſtance contained in the inſtrument, ſhewing it to be a Will, were ſufficient. It is prudent, but not neceſſary, that the witneſſes ſhould all at one time, conſequently in each other's preſence, ſubſcribe their names. But if the teſtator at three ſeveral times, before three different perſons, ſigns his name, or acknowledges a ſigning, (Peate and Ongly, Com. R. 197. Grayſon and Atkinſon, 2d Veſ. 457. Stonehouſe and Everlyn, 3 Wms. 254.) it is ſufficient, 3d Burr. 1775.

Deaf, dumb, blind, illiterate.

In the caſe of a blind man, or one deaf and dumb, yet ſufficiently ſenſible to make a Will, or of one who cannot read, eſpecial care muſt be taken to make the teſtator perfectly acquainted with the contents of the Will about to be executed, and alſo equal care muſt be taken to preſerve ſufficient evidence of his being acquainted with the contents, otherwiſe it cannot be determined to be *his Will*, Sec. 4. Burn Ecc. Law, 55. If a man is blind, let the Will be read over to him diſtinctly in the preſence of all the atteſting witneſſes, and let them atteſt, under their hands, that this was done. The ſame as to a man who cannot read. In caſe the teſtator is deaf and dumb,

dumb, let the witneſſes be aſſured he knows the contents of what he is ſigning. But ſuppoſe he is deaf, dumb, and blind? Even in this caſe I conceive a Will may be made, if the teſtator and his friends have any certain mode of communicating their ideas, as by the touch of the finger on one or other part repreſenting this or that word or letter; but this, as being a caſe of extreme nicety, will require peculiar caution.

Witneſſes to be diſintereſted.

The atteſting witneſſes ought to be diſintereſted perſons, i e. perſons not taking under the Will. But to remedy inconveniences, as it was often in urgent caſes neceſſary to make creditors or legatees witneſſes, the St. 25 G. 2d. c. vi. enacts, S. 1. that all deviſes to witneſſes ſhall be void, except a mere charging eſtates with debts; S. 2d. that ſuch deviſees whoſe legacies are hereby made void, and creditors atteſting ſhall be received as witneſſes; S. xi. that it is in the breaſt of the court and jury to determine what credit is to be allowed to theſe witneſſes.

WHAT PASSES THEREBY.

Where after-purchaſed copyholds may paſs.

We have already obſerved, under title "What may be deviſed," that after-purchaſed lands will not paſs. Alſo many variations of intereſt in the lands poſſeſſed by teſtator prevents their paſſing by the Will made before the variation of intereſt; but for this head ſee title, "Revocation."—After-purchaſed copyholds will not paſs, Spring and

Biles—Harris and Culler, cited 1 T. R. 438. in Swift and Gregſon. Where teſtator deviſed all the lands he ſhould die poſſeſſed of, and then purchaſed copyholds, and afterwards ſurrendered them to the uſes declared by his Will, they ſhall paſs by the Will, Cowp. 130. But after-purchaſed leaſes will paſs, Doubted, 1 Sal. 238. adjudged, 1 Wms. 575. Wind and Jekil.

REPUBLICATION.

By a Republication the Will becomes a new one from that time; therefore lands acquired ſince the making of the Will will paſs by it when republiſhed, provided there are words extenſive enough in ſignification to comprehend theſe lands. As H. deviſed all the lands he ſhould die poſſeſſed of; after making this Will he purchaſed other lands, and it was determined they ſhould not paſs, but by the court; if, after purchaſing theſe lands, he had republiſhed his Will, theſe lands then would have paſſed by it, 1 Sal. 237. Bunter and Cook. In ſome early caſes, after the ſtatute of frauds, it was determined that any ſlight expreſſion would republiſh a Will; as where teſtator ſaid, "My Will is in the hands of J. S."—this was held a republication, 2 Sho. 48. But it has been long ſettled, that the forms to be obſerved on making the original Will are neceſſary on a republication: Such ſtrictneſs was ſoon inſiſted on, that it was held neceſſary for the identical paper containing the deviſe to be re-

What will republiſh a Will.

executed

executed in preſence of three witneſſes, Lytton and Falkland, cited Com. R. 383, Barnes and Crow, 4 Bro. 8. This rule was afterwards relaxed, and a Codicil, atteſted to paſs real property, will in moſt caſes ſerve as a republication of the Will itſelf. If the Codicil confirms the Will, or is deſired to be taken as part of it, it republiſhes the Will, 4 Bro. 11, where Juſtice Wilſon obſerved, that by deſiring the Codicil to be taken as part of his Will, he incorporated the two inſtruments and made them one. In Goodright and Glazier, 4 Burr. 2512, a Will was made; ſome years afterwards another was made, but the firſt was not cancelled; then teſtator cancelled the ſecond, and the firſt was adjudged re-eſtabliſhed. See Bartonſhau and Gilbert, Cowper, 49. Goodright and Glazier ſeems acknowledged by Buller Juſtice, in Brady and Cubitt, Doug. 40.

When a Codicil republiſhes a Will.

ATTESTATION IN CASE OF PERSONAL PROPERTY.

As to perſonal property and copyhold intereſts leſs ceremony is requiſite as to atteſtation. It is to be recommended to the teſtator to ſign his Will of ſuch property in preſence of one or two reſpectable witneſſes, as by this means it will be eaſily authenticated—but leſs form may ſuffice. If the teſtator writes his Will in his own hand-writing, without even ſigning it, this may do, 2d Bl. Com. 501. Godolp. P. 1. ch. 21. ſec. 2d. If he gives direction to his attorney to put

down his intentions in writing, and the attorney does ſo, and reads what he had written to the teſtator, who approves it, but does not ſign the paper, this may ſuffice to make a valid Will, Lemberry and Hede, Com. R. 451, Carey and Aſkew, 2d Bro. 58, Worleck and Pollet, cited Com. R. 452.

CODICIL.

A Codicil is a further expoſition of the teſtator's deſigns, and is ſometimes written on the ſame ſheet as the original Will, ſometimes on a ſeparate paper, which is then uſually faſtened or annexed to the original. To do this is wiſe, as it will prevent miſtakes. A Codicil contradicting the Will might by chance not be found till the original Will was acted on. That annexing the Codicil ſhould have any other effect than preſerving it, ſeems very queſtionable, 1 Veſey, 442. Potter and Potter. — Whether ſtitched to the Will or not, there is a mental annexation, 4 Bro. 10. per Eyre.

A Codicil may revoke or alter any part of the Will and add new diſpoſitions, and the teſtator may make as many Codicils as he pleaſes, Willet and Sandford, 1 Veſ. 187. But if any material alterations are neceſſary, it is generally expedient to make a new Will. A Codicil paſſing real property muſt be executed as the Will itſelf. Under the title "Republication," ſomething is ſaid of a Codicil as republiſhing a Will.

If

If a deviſe is to A. and his aſſigns, he ſhall only take for life, 2d Bl. Com. 108. But if words of perpetuity are uſed, as to A. for ever, he takes a fee. As to the effect of the word "eſtate," ſee anti title, "Deſcription of thing deviſed real." The uſual mode of deviſing a life-eſtate is, "To A. for and during the term of his natural life."

Life intereſts, with remainders to heirs, or heirs of the body.

There are ſome very nice points relative to deviſes of life-intereſts followed by remainders to the heirs or heirs of the body of deviſee for life. The after-intereſt in many caſes conſolidates with the firſt, and gives the father or mother, or other firſt taker, a fee or a fee tail.—When by one inſtrument or conveyance lands are given to a man for life, with remainder to his heirs, or his heirs of his body, he takes in fee or fee tail, ſo may bar his heirs or iſſue. But for ſuch intereſts to conſolidate in the firſt taker, they muſt be both legal or both truſt intereſts*, 4th Ed. Fearne, 37. Shapland and Smith, 1 Bro.

Where they veſt the whole intereſt in the firſt taker.

Where not.

* If I deviſe to A. and his heirs during the life of B. to the uſe of himſelf and his heirs in truſt for B.—here the legal eſtate is in A. the profits B. is to have.—If the deviſe were to go on—"and from and after the death of B. I deviſe the aforeſaid premiſes to the heirs of the body of B."—B's iſſue are here pointed out to take not only the *profits* but the legal intereſt itſelf—and according to the rule above, B. could not bar his iſſue.—If the deviſe had been "to A. and his heirs, to the uſe of A. and his heirs, in truſt for B. for his natural life, and from and after his deceaſe in truſt for the heirs of the body of B."—here both B. and his iſſue taking truſt eſtates, the intereſts according to the rule conſolidate, and B. may bar his iſſue.

1 Bro. 75. Fearne, 95, 96. 165. 6. Doe and Fonnereau, Doug. 490. Silveſter and Wilſon, 2d T. R. 444. To enter into the principles of this doctrine would ſuit neither the length or the nature of this work, and perhaps it will not be difficult to enable the teſtator to avoid its effects. When the prudence or character of the firſt deviſee is ſuſpected, of courſe the teſtator will wiſh to ſecure the property to his children, ſo as entirely to prevent his control and alienation of their intereſts.—The teſtator may wiſh to benefit,

1ſt. The heirs male of the body of deviſee for life, excluding all females.

2d. The eldeſt ſon of deviſee for life, and his iſſue, male or female.

3d. If there are only daughters, he may wiſh to benefit them equally, and the heirs of the body of each.

4th. To prefer one daughter and her iſſue to the others.

5th. To give to one daughter and her iſſue male.

6th. To give amongſt ſome or all the children and their iſſue, male or female.

7th. To give a fee to ſome or all of the children.

1ſt. I give the premiſes to A. for and during the term of his natural life; and from and immediately after the determination of that eſtate, by forfeiture or otherwiſe, I give and deviſe the ſame to Arthur Jenkins and George Young, and their heirs in truſt only, to ſupport the contingent remainders hereafter deviſed from being defeated, barred, or deſtroyed.—And immediately from and after the deceaſe of the ſaid A. I give and deviſe the premiſes aforeſaid to his firſt and other ſons ſeverally and ſucceſſively, as they ſhall be in ſeniority of age and priority of birth, and to the heirs male of the bodies of ſuch firſt and other ſons lawfully begotten; the elder ſon and his heirs male of his body lawfully begotten always to be preferred before the younger and his heirs male.

2d. The ſame as the firſt; only when ſpeaking of the heirs of the bodies of the ſons, leave out "male," ſo that females alſo may take.

I have given this formula here as a hint which may ſuffice for this place; the others are drawn out in the precedents annexed.

Incidents of eſtates tail and life eſtates.

The different incidents of eſtates tail and eſtates for life are theſe: Tenant for life cannot convert his intereſt into a fee ſimple—his wife has no dower—nor has the huſband of tenant for life his curteſy.—Without a power ſpecifically granted, tenant for life cannot cut timber, pull down houſes, make a join-

a jointure, &c.—Tenant in tail may, by fine or recovery, convert his intereſt into a fee ſimple—and without doing that, the wife has dower and the huſband curteſy—he may cut down timber, and commit every ſpecies of waſte, 2 Bl. Com. 115. C. L. 53. a. Eſtates tail are general—as to A. and the heirs of his body lawfully to be begotten—To A. and the heirs male of his body—To A. and the heirs female of his body.—Special—as to A. and the heirs—or heirs male—or heirs female of his body lawfully to be begotten on the body of Ann his now wife, 2 Bl. Com. 113, 114, 213, 214.

Heirs of the body is the proper term for creating an eſtate tail; others may be ſubſtituted in a deviſe, but in ſuch ſubſtitution there is danger; as if there is a deviſe to A. and his iſſue—if he has no iſſue at the time, he ſhall take an eſtate tail; but if he *has* iſſue, he ſhall only take a joint life eſtate with them.—The iſſue in being may be ſuppoſed to be an object in the contemplation of the teſtator; then it is as if he deviſed to "A. and B." where, not uſing terms implying more than a life eſtate, no more ſhall paſs, 6 Co. 17. b. Wilde's caſe per Hale. 1 Vent. 229. See 4 T. R. 294. Doe and Collis.

Deviſe to a perſon and his iſſue, where there is iſſue living.

The intention of the teſtator (provided he does not exclude conſideration of his intention by uſing words of fixed technical conſtruction) being the firſt object to be attended to in examining a Will, what the Judges in Wilde's

Wilde's caſe had to conſider was, what eſtate did the teſtator *mean* to give—Popham and Gawdy (Moore 397) conſidered the deviſe as giving an eſtate tail to the firſt takers—all the line of their iſſue to ſucceed by inheritance—Clench and Fenner thought it was meant that the firſt deviſees ſhould have a life eſtate—the children born at the time of the deviſe to have alſo a mere life eſtate in remainder.—No technical conſtruction intervened.—If it could be drawn from the whole of a Will, that children born at the time of the deviſe, were not individually pointed out as objects to be benefited, but were to take as component parts of a whole line of deſcendants meant to ſucceed the firſt taker, their being born then would be a matter of little or no moment: But in theſe caſes the difficulty is, in what way *does* the teſtator conſider the children alive—whether as exiſting individuals meant a preſent eſtate in poſſeſſion, or does he compriſe them in a claſs, i. e. the general iſſue of the deviſee, whom he means to take in ſucceſſion, by deſcent, according to the rules of law.—In Oates and Jackſon, Str. 1172, the deviſe was to A. and her children, begotten and to be begotten, and their heirs for ever.—A. had a child—afterwards ſhe had others.—It was adjudged ſhe took a joint eſtate in fee with all her iſſue.—As a queſtion of intention, and it was no more, there appears to me ſome difficulty in the caſe:—She perhaps was meant to take the whole for life, with a remainder in fee amongſt all her children.—What was *in-*

tended was doubtful.—However it was to be decided ſome way.—Two words would have cleared the matter up—To A. "for life," and to her children, &c. had it been "to A. and her children equally, and their heirs," no doubt could have been entertained. It is ſaid by Hale, in King and Melling, p. 231, ſpeaking of Wilde's caſe, that the firſt takers were to be tenants for life, becauſe the remainder was "to their children," and they had children living at the time of the deviſe; but, ſays Lord Hale, it was not after their deceaſe, "to their children *of their bodies*, for then there would be an eye of an eſtate tail"—"of their bodies," is a term applicable to all their children, and ſo would have extended the conſtruction of the Will.

What words make a fee.

The proper words to make a fee are, to A. and his heirs; and this intereſt may be transferred by will, bargain, and ſale, leaſe and releaſe, feoffment, &c. entirely at the option of the deviſee: In fact, he is complete owner, and has entire power over the eſtate. Other words will give a fee, as to "A. for ever." So where an eſtate is deviſed with a charge added, abſolute, and not attaching on the rents and profits, as a deviſe to A. and that he ſhall give his executors 20l. the fee will paſs, for it might happen that the deviſee died before he could repay himſelf; but if the deviſe is to "A. he to pay 20l. out of the rents and profits," here he cannot loſe, and ſhall only take for life, Harg. Co. L. 9. b. n. 2. Goodright and Stocker. 5 T. R. 13,

13, 14. Baddeley and Leppingwell, 3 Burr. 15. 33. Frogmorton and Holyday, 3 Burr. 16, 18. But to rely on circumſtances of this ſort is introductory of much uncertainty, even amongſt profeſſional men. Where the word eſtate carries a fee—ſee ante under "Thing deviſed real."

PRESENT—IN REMAINDER—EXECUTORY DEVISES.

We have hitherto ſpoken chiefly of deviſes to take effect in preſent poſſeſſion. It may not be amiſs here to give a ſlight outline of the nature and allowed extent of future deviſed intereſts. A fee or perpetuity of intereſt may be cut out into various parts.—If a life-intereſt is taken from the fee, the perpetuity after that life-intereſt remains unaffected, and out of it other intereſts may be taken, as an eſtate tail: This eſtate is called a *remainder*, as being taken *from the intereſt which remains after the life-eſtate.*

There is ſtill ſomething remaining after this eſtate tail, which may be granted out in other intereſts: So if from 100l. we take 10, 90 is the remainder—20 extracted from that ſum, may be compared with the eſtate tail; and as theſe two ſums, with the remaining 70, make up the original 100, ſo the life eſtate, the eſtate tail, and the remainder after the eſtate tail, make up the original fee, 2 Bl. Com. 164. 5.

Inalienable eſtates diſcouraged.

In order to prevent eſtates from being inalienable for too long a period, which would be an evil in a commercial country, future intereſts, not barrable by fine or recovery, muſt veſt in poſſeſſion within lives in being, and one and twenty years and a few months afterwards, 3d Fearne, C. R. 321. To give effect to eſtates in remainder, there muſt always be a * *particular exiſting eſtate*, which in law is ſaid to ſupport it: So if between the ending of one intereſt and the commencement of another, there is any intervening time, the ſecond intereſt ſhall totally fail; for the eſtate deſcending on the heir at law, as undiſpoſed of for that interval, ſhall not ſupport the remainder, 2 Bl. C. 171. If I deviſe to A. for life, remainder to B. on the death of A. and M. and A. dies in M.'s life-time, B. cannot take the eſtate at A.'s death, for he is to take it when A. *and* M. are dead. Now there is no eſtate deviſed to take place between the death of A. and that of M.—ſo here the deviſe to B. entirely fails, Polex. 57. Weale and Lower. So if a deviſe is to A. for life, and after his deceaſe to his firſt

* Particular—"Particula"—a ſmall part of the inheritance.—If a deviſe is to A. for life, remainder to B. on M.'s death, and A. dies in M.'s life—*till M. dies*, B. by the terms on which his intereſt was given, can take nothing—what then is to become of the eſtate whilſt M. lives? As not diſpoſed of it muſt go to the teſtator's heir at law—the heir at law's intereſt during M's life is no part of the *deviſe*—in the chain of intereſts then there is a break, and the law will not allow this break, nor conſider the eſtate of the heir at law, *taking as ſuch*, to be ſufficient to ſupport remainders.

firſt ſon in tail, and A. before he has a ſon, ſurrenders his life eſtate to him who has the reverſion in fee, the ſon's intereſt is defeated; for on the determination of his father's intereſt he could not take, and not taking then, he ſhall not take at all, 2 Bl. Com. 171.

Remainders veſted. Contingent

Hence ariſes the difference between veſted and contingent remainders. Where the ſubſequent deviſee is capable to take, ſhould the prior intereſt end, his intereſt is called *veſted*. When he is not capable to take, ſhould the prior intereſt end, he is then ſaid to have a contingent remainder. "The preſent capacity of taking effect in poſſeſſion, if the poſſeſſion were to become vacant, univerſally diſtinguiſhes a veſted from a contingent remainder,"* 4th Ed. Fearne, 329. Now in the two caſes cited above, if M. were to die in A.'s life, *then* whenever A. dies, B. can take, and M.'s death converts his contingent into a veſted remainder; and when a ſon *is* born to A. on the father's ending his intereſt the ſon is ready to enter. In old family ſettlements the evils ariſing from contingent remainders were perpetual—If the father deviſed to his eldeſt ſon

* It ſhould ſeem this definition is not univerſally true.—If there are remainders after a contingent fee which may or may not ever take effect, theſe remainders are all deemed contingent, as in Loddington and Kime, 1 Sal. 224. Doe and Burnſall, 6 T. R. 30.—In the latter caſe a deviſe was to A. for life, remainder to her children in fee, remainder to B. who was living.—A. never had any children, and ſuffered a recovery—this was held to bar B. and all ſubſequent remainders. Now B. had certainly a preſent capacity of taking.

ſon for life, remainder to his firſt and other ſons in tail, remainder to the eldeſt ſon in fee—the father, before the birth of a ſon, had the eſtate completely in his own power. The remedy at laſt found out was to interpoſe truſtees to preſerve contingent remainders—*Then* if the father choſe to end his life-intereſt, the truſtees entered and ſupported the future ſon's intereſts, 2d Bl. Com. 172.—See the firſt formula ante, under title "Intereſt deviſed in realty."—Again, in the above deviſe to B. if it had run thus—"To A. for life, and from and after the determination of his eſtate to truſtees for and during the lives of A. and M. and after the deaths of A. and M. to B."—here the truſtees will ſupport B.'s future intereſt.

Where no remainder.

From the definition of a remainder given above, it is clear when once a *fee* * is limited there can be no *remainder*, as if I give the hundred pounds, neither 90l. or 10l. *remain*—but there may be a ſubſtitution of another intereſt in lieu of this deviſed fee, as if I give to A. and his heirs, but if he die before 21, to B. and his heirs." This is a ſubſtitution, but no remainder; neither can an intereſt deviſed at ſome future period, without a prior deviſed intereſt, be called a remainder; as if a deviſe be "to a woman

* This at firſt ſight may ſeem to militate againſt Loddington and Kime; but, in fact, it does not. The two fees were not in remainder one after the other, but on this or that contingency one was to take effect, the other to be entirely void—So in Doe and Burnſall, ſupra.

man on her marriage"—Prior to her marriage nothing is deviſed, her intereſt is *not* part of the fee pointed to take effect after a preceding intereſt pointed out by the Will. If a deviſe were to " A. for life, remainder to B. when married"—here B. has a contingent remainder, and ſhall take at A.'s death, if ſhe happens then to be married. When a fee is limited after a fee, or a future intereſt is deviſed without a preceding eſtate, it is ſaid to be an executory deviſe. So a deviſe to A. and his heirs; but if he die before 21, to B. and his heirs. The deviſe to B. is an executory deviſe. The *fee* is limited to A. therefore there can be no remainder, but a ſubſtitution. So a deviſe to the firſt ſon of R. that ſhall attain 21, is an executory deviſe, for no prior eſtate is created, and the intereſt in the mean-time deſcends to the heir at law, 2 Bl. Com. 173, &c. With regard to executory deviſes, it is the rule that they (to be valid) muſt be ſuch as will veſt or come in poſſeſſion within a life in being, and 21 years and a few months afterwards, 3d Fearne, 321, as to the firſt ſon of A. who ſhall attain 21. This is good, and it may be 21 years and ſome months before it veſts in poſſeſſion, as A. may have a Poſthumous ſon. This limitation, as to the veſting in poſſeſſion of theſe eſtates, is fixed on, becauſe they cannot be barred or prevented taking effect, 3d Fearne, 306. But limitations after executory deviſes, which limitations may not veſt in poſſeſſion within the limited time, may be good,

Executory deviſe.

When valid

good, as in Brownſword and Edwards, 2d Veſey, 243. Deviſe was to truſtees and their heirs to receive the rents, profits, &c. and if John Brownſword ſhould attain 21, or have iſſue, then to John B. in tail. If John B. dies before 21, and (or) without iſſue, then to S. B. in tail.—J. B. lived to be 21, and then died without iſſue, and S. B. took an eſtate tail, and Ld. Chancellor ſaid, (P. 249) if J. B. had died under 21 without iſſue, *then* S. B. would have taken as an executory deviſe; but when he arrived at 21, and took in tail in poſſeſſion, which eſtate might have continued for centuries, *then* S. B.'s executory deviſe was converted into a *remainder*, and might have been barred.

What has been ſaid on this ſubject has had for object the refreſhing the ideas of perſons acquainted with law, and of deterring thoſe unacquainted with it, from the very perilous effort of attempting to diſpoſe of their property, when any thing beyond a very ſimple deviſe is meant. I ſhall diſmiſs the ſubject of executory deviſes with a ſhort notice of two late caſes.—In Blandford and Thackerell, 2d Veſey, jun. 238, July, 1793, a deviſe was to truſtees (amongſt other things) to educate and place out fourteen of the children and grandchildren of certain of his relations, and Lord Chancellor declared that the truſt ſhould extend to *all* grandchildren who *in fact ſhould be born* in life-time of the perſons ſpecified in the Will; becauſe lives in being, and 21 years after, being the allowed limit, here

here the deviſe *muſt* be executed within lives in being and 14 years at moſt; which diviſion, in a more ſimple form, is this: A. has no child—a deviſe to his grandchild at 14 is not void, as A. *may* have a grandchild born to him in his life-time. The other caſe is Proctor and Biſhop of Bath and Wells, 2d H. Bl. R. 358. It was a deviſe to the firſt ſon of B. who ſhould be bred a clergyman and be in holy orders. B. had no ſon. *This* was declared *ab initio void*—the contingency was too remote; becauſe tho' certainly B. *might* have a ſon in orders even during his life, yet it might very probably happen to be 23 years after his death before any ſon of his could anſwer the deſcription of the deviſee. This caſe was in Mich. 1794.

It is a general rule that nothing ſhall be conſidered as an executory deviſe which may be taken as a contingent remainder, 3. Fearne, 418, Ray, 29.

Allowable contingencies.

To contingent remainders it is neceſſary, that to be good there muſt, at the time of their creation, be a probability of their taking effect. They muſt be good at firſt, to be good at all. A remainder to the right heirs of a perſon unborn is not good; it is too remote a probability, that during the continuance of the preceding eſtate, ſuch perſon ſhould both be born and die, for till his death no one is his right heir. So a deviſe in remainder to Richard the ſon of A. where A. has no ſon at the time, is bad for the

double uncertainty; 1ſt, that he ſhall have a ſon at all—2d, that this ſon, if he has one, ſhall be called Richard, 2d Blac. Com. 170. 2d Rep. 51. b. ſed vide Purefoy and Rogers, 2d Sanders, 380. I am not aware of any caſe in which the point was argued ſince Lord Coke's time, except Purefoy and Rogers, and there no objection appeared to be taken to the uncertainty ariſing from the name. The caſe went off on another point.

Unborn baſtards.

A limitation to an unborn baſtard is not good, Cro. El. 509. C. L. 3. b. See Mr. Hargrave's Note.—This caſe of Bloodwell and Edwards is differently ſtated in different books.—Mr. H. thinks the point ſettled.—Lord Macclesfield, in Metham and Devon, 1 Wms. 529, was ſtrongly againſt permitting baſtards born *after*, a deviſe "to the natural children which my ſon ſhall have by Mrs. Heneage" to take. Perhaps as much as may be to mix compaſſion with policy, it might be an allowed diſtinction, to permit baſtards in ventre ſa mere to take, but to prohibit deviſes to future begotten ones.

Contingent remainders cannot be limited on a leaſe for years, as the freehold would remain in the grantor or teſtator's heir. An executory deviſe, after a term for years, is good. If a veſted remainder is limited after a term for years, the remainder man takes the freehold immediately. Yet a veſted remainder, it is ſaid, cannot be limited on a leaſe at Will, 8 Co. 75. a.

After

After a life eſtate is limited to a perſon not in being, there can be no limitation beyond it to the children of ſuch unborn perſon, for that would tend to make the eſtate too long inalienable, the unborn tenant for life having no power, unleſs joined by a veſted remainder man in fee or tail of full age, to bar remainders, Harg. Co. L. n. 271. at p. 277. a. In Routledge and Dorril, 2d Veſey, jun. 366, Maſter of Rolls ſays, "A queſtion might ariſe how far an unborn child is to be made tenant for life; but it is eſtabliſhed, upon good principles certainly, that that may be. The doubt was, whether it was not tying up the eſtate beyond lives in being and 21 years afterwards: But that is not ſo when the abſolute intereſt is diſpoſed of and *veſted*, tho' part is given for life; for that perſon, with the perſon having the abſolute intereſt, may diſpoſe of the eſtate. It is not inalienable.

Life eſtate to an unborn perſon

REMAINDERS CROSS.

It is often wiſhed by teſtator that a ſubſequent remainder ſhall not take place till all the prior deviſees have died without iſſue; as if he deviſes Blackacre to A. and the heirs of his body, Whiteacre to B. and the heirs of his body, and if they die without iſſue of one or either of them, remainder to C. in fee.—Here, if B. die without iſſue, B. and his iſſue ſhall take, and C. ſhall have nothing till both die without iſſue, Dyer, 303. b. Hob. 33.—and in this caſe they are both

ſaid to have croſs remainders. The rule laid down by Lord Mansfield is, that croſs remainders between two ſhall be conſtrued favourably, but the court will lean againſt implying croſs remainders amongſt more—yet an explicit declaration will create them amongſt any number, Pery and White, Cowp. 777. Phipard and Mansfield, 797. Atherton and Pie, 4 T. R. 710.

DEVISE IMPLIED.

Intereſts are often created by Will without any explicit verbal deſcription of them—as if teſtator deviſes to his heir at law after the death of his wife, no eſtate is pointed out for the wife; but, from the implied intention of the teſtator ſhe ſhall take for life, Vaugh. 262. 3.—ſo if there is a deviſe to B and if B. die without iſſue, to C.—the iſſue of B. ſhall take, 1 Veſey, 26. Allanſon and Clitherow. 1 Wms. 605. Blacborn and Edgley. A deviſe was to A. for life, remainder to her firſt and other ſons and the heirs of their bodies; and in default of ſuch iſſue, *to her daughters as tenants in common*. Though it might be meant that the daughters ſhould take in fee or in tail, yet the court could not imply ſuch intention, but allowed them merely a life eſtate, 4 T. R. 83. Theſe implied eſtates are not favoured, and why ſhould the teſtator truſt to what may be of doubtful conſtruction, when an explicit expreſſion will make all clear? If, in the former

mer caſe, the deviſe had been to a ſtranger after the wife's death, ſhould ſhe take any thing? Vaugh. 266. mo. 123. 4 Bro. 534.

DEVISE IN SEVERALTY, JOINT TENANCY, TENANCY IN COMMON.

An eſtate in ſeveralty is where one enjoys the whole without any other joined in poſſeſſion with him. As if I deviſe to A. he holds in ſeveralty. Of joint-tenancy ſomething has been ſaid before; and that joint-tenancy is not favoured, ſee ante, title, "What may be deviſed." If an eſtate is given to more than one without reſtrictive or explanatory words being uſed, they ſhall take as joint tenants, and the ſurvivor enjoys the whole; as if I deviſe lands to "A. and B. and their heirs"—A. dies, B. ſucceeds to the whole in lieu of A.'s heir taking half. If I deviſe to two or more to take as tenants in common, there is no ſurvivorſhip. There is no abſolute neceſſity for uſing theſe words, "tenants in common."—To A. and B. equally to be divided, will make tenancy in common, at leaſt in a Will.—The regular phraſe is ſafeſt.—See 2d Bl. Com. ch. 12, throughout.

DEVISES OF PERSONALTY.

It was formerly held by the courts, that if goods or chattels were themſelves actually deviſed to any one, there could be no limitation or further deviſe over; but if the *uſe only* was deviſed, there might. The legal eſtate continuing

continuing in the executor or ſome appointee, ſufficed to give efficacy to theſe various uſes: But this diſtinction is now at an end; and though the thing itſelf is deviſed, there may be a deviſe over, provided the limits allowed by law are not tranſgreſſed, 8. Rep. 95. Skin. 341. 1 Wms. 1. Hyde and Parratt.

DEVISES OF PERSONALTY ARE SPECIFIC OR GENERAL.

A deviſe of any particular property, as, *my* black coat, *my* leaſe in A. is called ſpecific. The conſequence of a ſpecific deviſe is, that it ſhall not contribute its proportion with other deviſes towards paying debts; nor if, after debts paid, ſufficient does not remain to pay all the legacies, ſhall a ſpecific deviſe abate. If general legatees take only half *their* legacies, (or any other proportion) yet a ſpecific legatee ſhall take *his* undiminiſhed. To have all other perſonalty firſt applied to paying debts, and to have his legacy prior to all others, (Devon and Atkins, 2d Wms. 382) are the advantages of ſpecific legatee.—But he lies under this diſadvantage: If the ſpecific legacy is a leaſe, and is evicted, or goods, and burnt or deſtroyed, or debts, and loſt, as ſpecific legatee ſhall not contribute to others, ſo they ſhall not contribute towards him, Hinton and Pinke, 1 Wms. 540.

Effects of ſpecific deviſe.

What deviſes ſpecific.

Great doubts have ariſen as to what is a ſpecific legacy. Strictly ſpeaking, it is ſaid Lord Hardwicke, 1 Atk. 417, Purſe and Snaplin,

Snaplin, to be a bequeſt of a particular chattel, ſpecifically deſcribed and diſtinguiſhed from all others of the ſame kind—ſo money may be—as money in a certain cheſt—Lawſon and Stick, 1 Atkin. 508—or a particular debt—Ellis and Walker, Ambl. 310. A mere bequeſt of *quantity* is not a ſpecific legacy; as 100l. 1000l. 3 per cent. conſols; and where teſtator has not ſo much ſtock at the time of his death, it is a direction to the executor to purchaſe it, Partridge and Partridge, Ca. Tem. Talb. 227. It is clear enough from the definition above, that *any* 1000l. 3 per cent. conſols is no ſpecific legacy. But *my* 1000l. 3 per cent. conſols *is* a ſpecifie legacy, if teſtator has the ſtock at the time; and if he ſells it, it is ademption of the legacy, Aſhburner and Macquire, 2 Bro. 108.

There are terms uſed to deſcribe ſpecific legacies whoſe meaning is in many caſes doubtful; their exending to this or that property depending on particular circumſtances—goods—houſehold goods—chattels—linen—have created difficulties. Pr. Ch. 8. Chapman and Hart, 1 Veſey, 273. They ſeem to paſs *ſmall ſums*, not large ones. But what is a ſmall ſum? Let money be added, if it is meant to paſs. Rings and houſeholds goods were held not to paſs plate, Pr. Ch. 207. Jeſſon and Eſſington. But in the notes a caſe is cited in 63, in which houſehold furniture did paſs plate, and ſo 2d Wms. 420. Nicholls and Oſborne. On this

this part of the ſubject the caſes are very numerous and very diſſonant, and an enumeration of the particular ſorts of property meant to be deviſed is at once a ſure and an eaſy mode of avoiding doubt.

There is another ſort of inaccuracy in making ſpecific bequeſts, ariſing not from the neglect of ſuch words as properly deſcribe the ſort of thing, but the neglect of pointing out what things of that ſort ſhall paſs. As a deviſe of "her beſt linen," was held void: for what is *beſt linen?* Linen in ſuch a drawer, or worn on ſuch an occaſion, is definite.

DONATIO MORTIS CAUSA

Very nearly reſembles a ſpecific deviſe. It is a gift made by a perſon ſuppoſing himſelf near death, to be kept by the perſon to whom it is given if the donor die—and if the donor do not die, it is to revert to him. It muſt be delivered by the deviſor, or by ſome one authoriſed by him, 2 Bl. Com. 514. If the gift was abſolute, (i. e. a gift whether the teſtator ſhould die or not) it is not a Donatio Mortis Cauſa, tho' the teſtator does die.—A. gave a banker's check in this form—"Pay myſelf or bearer 200l.—Mark Bell"—he died in four days. By Lord Chancellor. This cannot be a Don. Mort. Cauſ. it was a preſent gift. The donee might immediately have gone to the banker's to receive the money, Tate and Hilbert, 2d F. Veſey, 115. 116. Delivery is a neceſſary part of a Donatio

natio Mortis Cauſa, Ward and Turner, 2d Veſey, 437. "If you take away the neceſſity of *this*, it is merely a Nuncupative Will," ib. p. 443. Lord Chancellor thought delivery of a ſymbol in lieu of the thing given not to be good. In all the caſes in the Court of Chancery delivery of the thing given, and not in name of the thing given, is relied on; as in the delivery of ſixpence in Shargold and Shargold. The only caſe in which ſuch delivery of a ſymbol ſeems to have been held good is Jones and Selby, Pre. Ch. 300, where the delivery of the key of a box ſeemed conſidered as ſufficient to paſs the property contained in the box; but Lord Chancellor thought the delivery of the key to be eſteemed a mode of putting into poſſeſſion of the property." In Millar and Millar, 3d Wms. 358, it is ſaid, a note not payable to bearer could not be given as a Don. Mortis Cauſa, becauſe it was a Choſe in Action, and to be ſued in name of executors. In ſame caſe 600l. in bank notes was allowed a good Don. Mortis Cauſa, Snellgrove and Bailey, 3d Atkins, 214. Delivery of a bond is good to make a Don. Mortis Cauſa—ſee the caſe of Ward and Turner, 2d Veſey, 431, where the ſubject is conſidered at length. The principal point was, whether receipts for South Sea Annuities, being given on proſpect of death, could paſs the annuities themſelves, and it was determined they could not. Enough has been ſaid on this ſubject to ſhew that it is by no means ſafe for a perſon in his illneſs to ſatisfy himſelf with what *he* may deem a ſufficient bequeſt of property by way

Muſt be delivery of the thing.

Choſes in action.

of Don. Mortis Cauſa. In almoſt any caſe three lines on a ſlip of paper, by way of Codicil, ſigned by teſtator, or even read over to and approved by him, will take away every poſſible doubt.

DEVISES OF PERSONALTY VESTED OR NOT.

If a deviſe is veſted, though it be not immediately payable, it ſhall go to the executors of deviſee. If it is contingent, and the contingency never happens, of courſe it ſhall ſink into the fund whence it would have been payable. A legacy *payable at* 21, (or any other age) or *to be paid* at 21, is veſted: But a *deviſe to A. at* 21, or *if* he attain 21, is contingent, Stapleton and Cheales, Pre. Ch. 317. The difference between the two ſets of caſes is ſufficiently obvious: In the firſt there is a *general*, i. e. *a preſent*, *deviſe*, with a *particular time of payment*; in the ſecond there is *no* preſent deviſe, but a poſſible one, a *deviſe at* 21, or *if* 21. But if other circumſtances ſhew that this apparently contingent deviſe is meant to be a preſent one, as if intereſt on the legacy till time of payment is ordered, then it is veſted, Pre. Ch. 318. But legacies charged on real property, or a term for years, and deviſed *generally*, *payable* or *to be paid at* ſuch an age, ſhall *not* go to the executors of a perſon dying before the time of payment, but ſhall ſink into the eſtate, 2 Bro. 106. n. Pr. Ch. 318. But if the teſtator expreſsly veſts the legacy charged on land, it ſhall go to the perſonal repreſentatives. Nor does Mr. Butler doubt but that if an expreſſed intention

is

is ſufficient to make it veſted, but alſo an implied one may, if the implication is ſtronger in favour of veſting the legacy than of not veſting it, H. Co. L. 237. n.

DEVISES WITH RESTRAINTS ON MARRIAGE.

It is not unuſual to make deviſes, adding a condition of "marriage with conſent of a parent, a guardian, or ſome other perſon." In many caſes theſe conditions are held good; in others they are conſtrued to be merely in terrorem—as a ſort of check on the legatee, acting on his fears, but not really ſubjecting him to loſe the legacy. If there is a deviſe over on marriage without conſent, the condition ſhall be valid, and the deviſe over good, 3d Atkins, 331, Reyniſh and Martin. In Scott and Tyler, 2 Bro. a deviſe over of the reſidue was eſteemed ſufficient to make a forfeiture. If the deviſe is of perſonalty, and the legacy not to veſt till marriage with conſent, ſtill on marriage without conſent the legacy is due, if not limited over, 3d Atk. 330. It is the ſame if the legacy is charged on real property in aid of perſonal, ib. If the legacy is originally charged on land, it ſhall not be paid till the condition is performed—ſc marriage with conſent, ib. 333. A teſtator deviſed that a condition ſhould not be in terrorem, but be valid.—This is doubly in terrorem, ſo not to be conſtrued differently from the common caſe, Long and Dennis, 4 Burr. 2053. A condition impoſed by a ſtranger is equally valid with one im-

poſed by a parent, per Willes, Harvey and Aſton, 1 Atk. 377.

Conſent given after the marriage.

It ſhould appear an after-conſent will ſuffice.—Reyniſh and Martin, cited above, is contrary.—But Lord Hardwicke, in Hurleſtone and Humphreys, Amb. 256, nine years after his dictum in Reyniſh and Martin, ſeemed of another opinion. See n. 1, 1 Atk. 381, 2d Atk. 264. n. 3d Ed. In Dunning and Long, Burr. 205. Lord Mansfield holds Hurleſtone and Humphreys to be right. Maſter of the Rolls ſays, in Mercer and Hall, 4 Bro. 328, A conſent after marriage has been held to be good, where the conſent was *not* required to be in writing.—This was an *obiter* ſaying, not the particular point in queſtion. Lord Manſfield, in the caſe in Burrow, is of opinion, that even where a written conſent is required, an after-conſent may ſuffice.

DEVISE OF PERSONALTY—IN PROESENTI—REMAINDER.

If a deviſe of perſonalty is expreſſive of an eſtate tail—As to A. for life, and afterwards to the heirs of his body, (in which caſe A. is conſtrued to take in tail—ſee ante, "Intereſt deviſed in Realty") the firſt deviſee takes the whole intereſt, and a remainder over is void, 2d Veſey, 661, Garth and Baldwin, per Ld. Chancellor, Jacobs and Amyatt, 4 Bro. 542. "I admit the rule in Dawes and Earl Chatham, that where perſonalty is ſo given, if

if the words would create a tenancy in tail in land, it is abſolute; but that rule has never been extended further than where the words create a clear eſtate tail." But this rule of artificial conſtruction, it ſhould ſeem, is only applicable where there is no apparent intention of uſing words in their natural meaning; "and for that purpoſe, which is in favour of common ſenſe, the moſt trifling circumſtance is ſufficient," per Buller, 1ſt T. R. 597, Doe and Lyde. So to A. for life, then to the heirs of her body, *to be divided amongſt them, ſhare and ſhare alike*—This gives A. no more than a life intereſt, 4 Bro. 542. If a deviſe of a term is to A. and his heirs of his body, and if he die *leaving* no heir of his body, to go over—*this* deviſe over is good, becauſe it is a contingency certainly confined to a life in being, and this contingent limitation, within the allowed bounds, prevents the firſt deviſee taking the whole intereſt, 2d T. R. 720. Goodtitle and Pegden. But it is to be remembered, that a deviſe to A. and his iſſue, and if he *dye without iſſue*, remainder over, the remainder over is *not* good, becauſe in law the meaning of *dying without iſſue* is a *general or entire failure of iſſue*, and there may not be an entire failure of iſſue for centuries, Bigge and Benſley, 1 Bro. 187.

Dying *leaving* no iſſue.

Dying *without* iſſue.

The caſes on this ſubject are numerous and complex, and I have ſaid only little on it, becauſe to ſay much, and to ſay with certain preciſion, required more time than could well be given to a very ſmall portion of a very ſmall book. The

Remainders in chattels after life eſtates.

The courts were long in permitting any limitation of a chattel intereſt after what would in real eſtate have made a freehold: So if a leaſe were deviſed to one for life merely, the whole veſted in him, 8 R. 95. When, in compliance with the teſtator's intention, this rule was broken through, the ſubſequent intereſt was called an executory deviſe; and thus it was named, whether there was or was not a *failure* of ſupport. The rule now is, that to be good a future diſpoſition of perſonal property muſt veſt, i. e. come in poſſeſſion within lives in being and 21 years afterwards. The laſt caſe in which this rule was acknowledged, and in part acted upon, was Blandford and Thackerell, 2d Veſey, jun. 238. This rule is laid down in analogy to that obſerved in real eſtate; but as fines and recoveries do not apply to perſonalty, as is ſaid above, the firſt *veſted eſtate* tail gives the entire intereſt; were it otherwiſe, the next executory deviſe beyond it might wait beyond the allowed time before it veſted in poſſeſſion:—So in Foley and Burne, 1 Bro. 274—Deviſe of furniture, &c. Father was tenant for life, ſon veſted remainder man in tail—it was held the ſon took the entire intereſt, (ſubject to the life eſtate) and he dying before his father, his father ſucceeded to this intereſt as his ſon's perſonal repreſentative.

When to be good deviſes of perſonalty muſt veſt in poſſeſſion.

Conditional diſpoſition of the whole intereſt.

It was for a time held, that where there was a conditional diſpoſition of the whole property, no remainder over would be good, though

though the firſt conditional diſpoſition never took place. This has ſince been over ruled— as, A term was ſettled on huſband and wife for life, then on the firſt ſon of the marriage, and *the heirs of his body*, then over, the limitation over was held good. But in prior caſes, as the unborn ſon's poſſible intereſt would have been an entire ownerſhip, it would have been held, that whether there was a ſon or no, the limitation over could not be good, Higgins and Dawler, 1 Wms. 98, 3 Ed. Fearne, 407.

May have limitations after it.

LEGACIES IN SATISFACTION OF DEBT.

A legacy is ſometimes conſidered merely as a ſatisfaction of an exiſting demand on the deviſor, Pre. Ch. 394, Talbot and Shrewſbury. But it were well that the teſtator ſhould be explicit and ſay whether he meant it for a ſatisfaction or not. If a ſum is ſecured by a marriage ſettlement, and the father afterwards deviſes this ſum for the child's portion, the child ſhall not have both the ſums, Copley and Copley, 1 Wms. 146, Finch and Finch, 4 Bro. 38. But if the debt aroſe merely on a running account, ſo that teſtator might not know that any debt exiſted, the legacy ſhall not be deemed a ſatisfaction, Rawlins and Powel, 1 Wms. 299. If the legacy is greater or leſs than the debt, it ſhall not be conſidered as extinguiſhing the debt, or ſatisfying it in part, 2 Sal. 508, Cranmer's Caſe.

Where.

Where not.

If

If the deviſee die before the teſtator, the deviſe is lapſed, i. e. void, and the ſubſequent deviſee or heir at law ſhall take immediately. If a deviſe is to A. and his heirs, and A. dies before the teſtator, the teſtator's heir, not the heir of A. ſhall take, 1 Rep. 155. b. Fuller and Fuller, Cro. E. 423. There is a very hard caſe of this ſort:—The deviſe was to A. and his iſſue, remainder to B. and his iſſue, remainder to the right heirs of A.—A. died before the teſtator, and it was adjudged by the whole court that the right heirs of A. ſhould take nothing; for, their anceſtor having had left to him a freehold intereſt, followed by a deviſe to his heirs, theſe two intereſts, according to the principle mentioned ſupra, (title, Intereſt deviſed in Realty) would have conſolidated in the anceſtor; and ſo it was as if a deviſe had been "to this anceſtor and his right heirs"—in which caſe clearly the heir could take nothing, if the anceſtor died before the teſtator, Goodright and Wright, 1 Wms. 397, cited 4th Ed. Fearne, 255.

In a caſe from Ireland—The father deviſed to his eldeſt ſon in tail male, remainder on the determination of this eſtate to his ſecond ſon in tail male, and ſo on.—The eldeſt ſon died in his father's life, leaving a ſon.—The father died—it was adjudged that the ſon of the eldeſt ſon could take nothing, but the ſecond ſon was entitled: As to the eldeſt ſon and his heirs male, it was a lapſed deviſe—cited 1 Bro. 219, Jones and Morgan.

Where

Where the heir or iſſue is to take under a continuation of the prior deviſee's eſtate or intereſt, *then* if the deviſee dies before the teſtator, the iſſue or heir ſhall take nothing. If a deviſe is to A. and the heirs of his body, A. would take in tail, his eldeſt ſon would take after his deceaſe under a continuation of this eſtate tail. So if a deviſe is to A. and his heirs, and A. comes into poſſeſſion and dies, the heir of A. takes as ſuch, and as a continuation of this fee ſimple deviſed to A. But if the heir or iſſue does *not* take as continuing the prior eſtate, *then* he ſhall take, though the prior deviſee do die before the teſtator.—So if a deviſe is to A. for life, and after his deceaſe to his eldeſt ſon and the iſſue of this eldeſt ſon (in which caſe there is no conſolidation of A.'s prior intereſt and the ſubſequent one to his ſon)—here, though A. dies before the teſtator, his eldeſt ſon ſhall take, for he takes under no continuation of his father's intereſt, which was a life eſtate ending with himſelf, and to which eſtate the ſon is as a perfect ſtranger.

Where heir or iſſue cannot take.

Where they can.

DEVISE VESTED.

But in ſome caſes deviſes do not lapſe, though the deviſee under whom the claim is, is never in poſſeſſion. Deviſe to A. till B. attains 18, then to B. and his heirs, B. ſurvives the teſtator, but dies before 18, B.'s intereſt is veſted and ſhall go to his heirs, 4 T. R. 41. 3 R. 21. R. 2. Mod. 290.—Deviſe to A. for years, remainder to B. in

fee, the freehold veſts immediately in B.—It has been determined, that if deviſee in fee or in tail die before the teſtator, and the teſtator republiſhes his Will, yet the heir or iſſue in tail ſhall not take. A republication is no explicit deſign of re-eſtabliſhing a deviſe which had become utterly void.

LEGACY LAPSED.

Where the deviſee of perſonalty dies before the teſtator, his deviſe lapſes, though the deviſe had been to A. his executors, adminiſtrators, and aſſigns To make it valid to the repreſentatives of the deviſee, there muſt be ſomething to expreſs that intent clearly; as, to A. and if he die before me, to his executors, adminiſtrators, or next akin, 3 Bro. 224. Bridge and Abbot.

REVOCATION OF DEVISE.

By the St. 29. Ch. 2d. C. 3d. S. vi. deviſe of realty muſt be revoked by a Will or Codicil, (executed to paſs land) or by a writing ſigned by the teſtator in preſence of three or four witneſſes.* Nor (Sec. xxii.) ſhall a Will

* It is neceſſary particularly to attend to the difference to be obſerved in *executing* a *Will of Lands*, and in *revoking* a Will of Lands.—The *Will* muſt be executed by the teſtator in preſence of three witneſſes, who are all to atteſt the execution in the teſtator's preſence;—but a mere revocation requires that the teſtator ſhall actually ſign in the preſence of three witneſſes, but it is not neceſſary that the witneſſes ſhould ſign in the teſtator's preſence.

Will or clauſe of one relative to perſonal property be revoked otherwiſe than in writing, unleſs the oral revocation be put down in writing, be read to and approved by the teſtator, and this be proved by three witneſſes. Alſo cancelling, tearing, burning, obliterating a Will, are revocations *, S. vi. A deed, though not valid as an appointment to uſes which it was intended to be, may yet be good as a revocation of a Will, if ſuch it is meant to be, Shove and Pinch, 5 T. R. 124—310.

* In Onions and Tyrer, 1ſt Wms. 342. The teſtator deviſed lands by a Will properly executed, then by another Will he deviſed them to other truſtees to the ſame uſes—the latter Will was not duly executed, as the teſtator ſigned in preſence of three witneſſes, but the witneſſes did not ſign in the teſtator's preſence.—As the ſecond Will was not in fact meant to be a revocation of the firſt, the land being deviſed to the ſame uſes, the firſt Will was held good.—For by the Lord Chancellor, "The better evidence is, that the Will was not cancelled by tearing it in the preſence of the teſtator; but if the teſtator did order it to be cancelled, the effect of ſuch cancelling depended on the validity of the ſecond Will, and ought to be taken as one act done at the ſame time:—So that if the ſecond Will is not valid, as the teſtator thought it was, and without which he would not have cancelled the firſt, the cancelling of the firſt Will depending thereon, ought to be looked upon as null alſo," N. to P. 344.—Cancelling is itſelf an equivocal act, it muſt be done animo revocandi, Burtenſhaw and Gilbert, Cowp. 49. With regard to revoking by ſubſequent deviſe, it is neceſſary that the ſecond Will ſhould expreſſly revoke or be clearly incompatible with the firſt deviſe, *as to the particular ſubject matter of ſuch deviſe;* for where an effective deviſe has once been made in diſheriſon of the heir at law, it ſhall be on the heir to prove ſuch deviſe as effectively defeated, Harwood and Goodright, Cowp. 87, 7 Bro. P. C. 344.

Implied revocations.

Alterations in the situation of the family.

There are alſo implied or legal revocations—as where teſtator made his Will, then married; his wife ſome time after told him ſhe was with child, whereupon he ſaid he would revoke his Will; however he died without doing ſo, and before his wife was brought to bed. The Will was deemed revoked, not ſo much on the intention to revoke, (for intention to revoke is not within the ſtatute) as on a tacit condition annexed to the Will itſelf, that it ſhould not take effect if there were a total change in the teſtator's family ſituation, Per Kenyon, C. J. Doe and Lancaſhire, 5 T. R. 58. But theſe preſumptive revocations are many of them of a very nice nature, and not to be depended upon with any certainty. In Shepherd and Shepherd, at Doctors Commons, ſtated 5 T. R. 51, a Will was made, then a child born; a Codicil gave this child an annuity, the wife was made reſiduary legatee, then two more children were born. The birth of theſe children, who were unprovided for, did not revoke the Will. In Foſter and Cook, 3 Bro. 347, A. deviſed his eſtates to the child his wife was then en ceint with—remainder over on its dying without iſſue. The child was ſtill born—he then made a Codicil confirming his Will. Forty weeks after his death his wife was delivered of a ſon. The legitimacy of this ſon was found by a verdict at common law; but the Lord Chancellor held it intitled to nothing, whatever the teſtator might have done had this child been in his contemplation—as matters ſtood

Where not allowed.

it

it was disinherited. See Brady and Cubitt, 1 Dough. 31.

Almost any alteration in the property or possession of an estate is a revocation. "The law requires a continuance of the same interest; even the least alteration of this interest is an actual revocation," per Trevor, C. J. 11. Mod. 157, Archer and Botenham. If a man devises, then makes a conveyance of the lands, then purchases them again, this is a revocation of the devise of these lands, Gilb. Wills, 101. If a person is seised of a lease for three lives, and devises it, and then surrenders the lease in order to take a new one, this is a revocation, Abney and Miller, 2d Atk. 593, 1 Bro. 261, Hone and Medcraft. Articles to convey revoke the devise, 2d Wms. 624. A recovery suffered with intent to confirm a Will, is a revocation, per Lord Hardwick, 5. Bac. ab. 527.—but mortgages are only so far revocations as to pass the lands subject to the burden, ib. If a man devises, then leases the lands, it is only a revocation during the lease, 1 Rol. ab. 616. U. 1. "The common rule that the estate must pass by the last conveyance applies—but then it must be a conveyance of the whole estate—it must extend as far as that appointment which the Will has made; for if it is but of a part, it affects the Will no farther than that part goes.—If it is of a partial interest, it will not operate as a revocation of the rest," 2d Vesey, jun. 428. per Lord Chancellor, in Brydges and Chandos. To be safe in all alteration

Alterations of interest in the property devised.

Where no revocation—leases. Mortgages.

caſes we would adviſe the teſtator, where any alteration in his eſtate has taken place, to republiſh his Will, or add a Codicil, declaratory of his intention, that the land ſhall go as deviſed—on the other hand, that he ſhall directly revoke a bequeſt he does not mean to ſtand.

Revocation of perſonal deviſes.

As to revocations in caſe of perſonalty:—If a ſum is deviſed and another given after the Will made to the deviſee in the teſtator's life-time, it will in many caſes amount to an ademption of the legacy:—But if two legacies of the ſame ſum are given to the ſame perſon in a Will and a Codicil, the legatee is intitled to both, unleſs there are circumſtances from which a different intention could be collected—and proof of theſe is thrown on the executor, James and Semmers, 2 H. Bl. 219. If the two deviſes are in the ſame inſtrument, legatee ſhall have but one, unleſs *he* can prove the teſtator's intention different, Swinb. 526, cited 2. H. Bl. 218. To ſpecify caſes might only miſlead the teſtator, by inducing him to exert his own judgment on theſe preſumptive revocations—Let him note in his Will ſuch a ſum is or is not meant in part a ſatisfaction of the legacy.

RESIDUE.

Many difficulties have ariſen as to what ſhall become of the ſurplus or reſidue of the perſonalty after debts and legacies—ſhall it go to the executor, or ſhall it be diſtributed amongſt the next a-kin, according to the Statute?

Statute? If there is no executor appointed, the remainder clearly is diſtributable;—if there is a reſiduary legatee, it is equally clear that the executor has no claim.

By making an executor, the teſtator points out a perſon in whom veſts the legal intereſt in all his perſonalty. On this property debtors and legatees have a claim, but their claims being ſatisfied, as the property is at law the executor's, he ſhall retain it, except circumſtances ariſe which ſhall convert him into a mere truſtee of this ſurplus. Where executors ſhall take.

After premiſing that all doubt may be avoided by two moſt ſimple expreſſions:—"As to the reſidue, I make my executor truſtee for my next akin"—"As for the reſidue, I give it to my executor." I ſhall ſtate a few of the caſes in which the executor has or has not been deemed truſtee for the next akin.—The rule, as uſually conceived, is, that a legacy to the executor ſhall bar him of the reſidue, for he to whom a part is given is not meant to take the whole, Hornſby and Finch, 2d F. Veſey, 79. But as determined in Lawſon and Lawſon, 7 Bro. P. C. and agreed to by Lord Chancellor, 2d F. Veſey, 80, the mere circumſtance of the executor's having a legacy is not ſufficient to bar him of the reſidue—it muſt be ſo qualified that the giving it is inconſiſtent with the ſuppoſition that the executor is to take the whole. See Clennel and Lewthwaite, 2d Veſ. jun. 465. This conſtruction of the rule leads Where legacy no bar.

leads to many nice diſtinctions and uncertainties. If there are two executors, and one only has a legacy, neither ſhall be excluded from the ſurplus, 2d Veſey, 97, Cloyne and Young. If a reſidue is deviſed, and a blank left for the name, this is ſtrong againſt the executor, ib. 16. In Nichols and Criſp, Amb. 768, executors had legacies, and the reſidue was deviſed, but the deviſee died before teſtator—the lapſed legacy was adjudged to the next akin. If executors have unequal legacies, they ſhall not be excluded the ſurplus, 1 Bro. 328, Bowker and Hunter. In Pickering and Stamford, 2d F. Veſey, 272, executors were deviſed the whole perſonalty in the Will—a Codicil gave it them in truſt to charitable uſes. Part of this laſt diſpoſition was void as to the uſes—the executors were conſidered as to the void part mere truſtees for the next akin.

As it is not the object of this little work to conſtrue Wills when made, but to ſuggeſt a few hints to thoſe who have to make them, it is not worth while further to produce caſes on a point the very exiſtence of which a ſingle ſentence will guard againſt.

OF TRUSTS.

In many caſes the teſtator's intentions will be beſt ſecured by a deviſe in truſt. Deviſes for any particular purpoſe will be compelled by Chancery to do that for which their deviſe was created, Com. Dig. Ch. 4. W. 1.

As

As if lands be deviſed to truſtees and their heirs to ſell and pay debts—ſee Harg. Co. L. 113 a. n. 2.—in truſt out of the rents and profits to pay an annuity for life—or if there is a deviſe of money or lands in truſt to pay the rents and profits to the ſole and ſeparate uſe of a married woman, without the control of her preſent or any future huſband. If a deviſe, without naming truſtees, is expreſſed to be for the ſole and ſeparate uſe of a married woman, her huſband ſhall be a mere truſtee for her, Bennet and Davis, 2d Wms. 316, 3 Bro. 381, Lee and Prieaux. If the truſtees named are incapable to take, the truſts ſhall attach on the legal eſtate, which in that caſe will fall to the heir at law, Sonley and Clockmakers' Company, 1 Bro. 81. And if occaſion requires, Chancery will oblige truſtees to give ſecurity, 1 Ch. R. 100.

Truſts executed executory.

A great diſtinction has been made between truſts executed and truſts executory. Where the intereſt of the perſon to be benefited by the Will (ceſtui que truſt) is directly created by the Will, it is called a truſt *executed*. The teſtator has taken upon him definitely and ultimately to give the truſt intereſt himſelf; as where a teſtator makes A. a truſtee for B. for life, and after his deceaſe for the heirs of the body of B.—Jones and Morgan, 1 Bro. 206.—Here the teſtator himſelf creates B.'s intereſt, and, according to the rule mentioned above, B. is tenant in tail: but if, inſtead of creating the intereſt himſelf, the teſtator had deviſed to truſtees and their heirs in truſt to

make a ſettlement on B. for his life, and afterwards on the heirs of his body—here the teſtator does *not* take on himſelf to be the direct and immediate donor, but refers to a future conveyance to be ſettled at leiſure by ſkilful hands, and in ſuch caſe Chancery would decree B. to take for life only, ſecuring eſtates tail to the iſſue. This was the caſe in Baſtard and Proby, at the Rolls, 1788, cited 4th Ed. 2d. Wm. rep 478—ſee 4th Fearne, 213, and Seq Papillon and Voice, 2d Wms. 471, Auſtin and Taylor, Amb. 376, Brown and De Laet, 4 Bro 527. This hint may be ſufficient to induce perſons, who may not have proper aſſiſtance at hand, to content themſelves with making merely executory truſts, where the intereſt will be given full effect to by the Court of Chancery, however ignorantly and improperly the teſtator may make uſe of terms of law; whereas, if the teſtator will create the intereſt himſelf, the legal import of words muſt often prevail againſt his wiſhes. This is adviſeable, more eſpecially where large eſtates are deviſed, in which caſe the expences of future conveyances, under an order of Chancery, would not be felt.

Recommendations

There is a ſeries of caſes in which great doubt has ariſen whether or no there is a truſt—as where there are wiſhes, deſires, or recommendations of having perſons remembered by the deviſee, &c.—as, " and it is my dying bequeſt that the ſaid P. if he ſhould die without iſſue living at his death, diſpoſe of

of the property amongſt the deſcendants of A." Pierſon and Garnet, rep. Pr. Ch. 200, in a note to 2d Ed. This recommendation was deemed binding. Bland and Bland, cited ib. "and it is my earneſt requeſt to my ſon that he ſettle, in his life-time, *the ſaid eſtate, or ſo much as he ſhall be ſeiſed of at his death*, on A."—This was not deemed obligatory, becauſe the words "or as much, &c" plainly ſhewed that the ſon was meant to have complete power over the eſtate. The rule laid down in Malim and Keighley, 2d Veſey, jun. 335, per Maſter of Rolls, is, "Wherever any perſon gives property, and points out the object, the property, and the way in which it ſhall go, that does create a truſt, unleſs he ſhews clearly that his deſire expreſſed is to be controlled by the party, and that he ſhall have his option to defeat it." This rule renders the matter perfectly eaſy. If the teſtator is decided which way the property *ſhall* go, let him uſe words by which deviſes are uſually made. If he truſts to the deviſee, meaning him to act at his diſcretion, (exerting itſelf on the exiſting circumſtances at the time when the recommendation muſt take place, if at all,) ſhall point out, let him in direct terms liberate the deviſee from all controul of Chancery, or any other Court, Harland and Trig, 1 Bro. 142, Wynne and Watkins, 1 Bro. 179, ib. Nowlan and Nilligan, 489.

GUARDIANS.

By the St. 12. Ch. 2d. C. 24. S. 8. 9. A father may, though a minor, by Will or

Deed, atteſted by two witneſſes, appoint a guardian or guardians to his children.—He may appoint for any length of time, till 21, or for a ſhorter ſpace, and to ſeveral in ſucceſſion; as to his wife whilſt ſhe remains a widow, on her marriage to another.—If father deviſe the cuſtody of his ſon without ſaying for what time, it is only good till he is 14, per Vaugh. 184, 185. This guardian ſhall have the cuſtody of all the infant's property, ib. 186—ſee H. Co. L. 89, a. n. 15.

OF CHARGING ESTATES WITH DEBTS AND LEGACIES.

It is every man's duty to make ſufficient of his eſtates liable to all his debts. *The law* does not charge real property with ſimple contract debts; therefore this is neceſſary to be done by Will *. Chancery has been very aſtute in diſcovering a deſign to ſaddle debts on land,—as a deviſe—"I will that all my debts, legacies, and funeral expences ſhall be paid and ſatisfied in the firſt place," was held to make lands liable, Pre. Ch. 430. Trott and Vernon.

Debts. In many caſes it is moſt wiſe to make an expreſs deviſe of particular lands to truſtees and their heirs, or to them and their executors for a long term, and to make this eſtate liable to debts to the excluſion of others. By doing

* In a bond the heir muſt be named as well as the obligor, otherwiſe he is not bound, Barber and Fox, 2d Saund. 136.

doing this clearly and ſufficiently, the reſt of the landed property being free from all charge, is directly capable of every ſort of transfer without endangering purchaſers.

A great queſtion has ariſen what property is firſt to be applied to pay debts? If the perſonal is firſt to be applied, the intereſt of all the legatees may be materially affected, *they* may loſe all benefit, and deviſees of land enjoy *their* whole deviſes. If the Will is ſuch as to ſaddle land firſt, *then* the direct contrary takes place.

How far legacies ſhall be charged on lands is a nice queſtion. If legacies are charged on lands, and there are any lands which deſcend to the heir at law, he ſhall take them liable to the legacies, Scott and Scott, Ambl. 383, Clifton and Burt, 1 Wms. 678. Where lands are not charged with legacies, but go to the heir at law, Chancery will, marſhall aſſetts, or make the ſpecialty debts chargeable on the land, ſo as to leave the perſonalty to ſupply the legacies, Hanby and Roberts, Ambl. 128. If lands are *deviſed*, and there are ſpecialty debts which exhauſt the perſonalty, the deviſed lands ſhall not be liable to general pecuniary legacies not charged on theſe lands, ib. 129, Clifton and Burt, ſup. The teſtator, it is to be preſumed, as much meant the deviſee of the land to have his bequeſt, as the deviſee of the perſonalty to have his. To make ſpecific deviſes of land liable to legacies, the intention muſt be very plainly expreſſed, Kightly and Kightly, 2d Veſ. jun. 328, Legacies.

328, Trott and Vernon, Pr. Ch. 430, Gilb. Chan. 332, S. C. 2d Vern. 708, S. C. If ſome legacies are charged on real property deviſed, others not charged on real property, the legacies charged on the real property deviſed ſhall leave the perſonal aſſetts liable to the other legacies, and if paid out of the perſonal aſſetts, the realty ſhall be liable to the amount of the perſonalty paid, Hanby and Roberts—See Note 1, P. 679, Vol. 1, 5 Ed. Wms. Rep.

What fund firſt chargeable.

We are next more particularly to conſider the charging lands with debts—1 Bro. 462, Ancaſter and Mayer, per Lord Chancellor. "I take it the rules have been theſe, and they ſhould be adhered to.—In the firſt place that the perſonal eſtate is liable in the firſt inſtance to payment of debts; but in exception to this it is agreed, that the teſtator may, if he pleaſes, give his perſonal eſtate, as againſt his heir or any other repreſentative, clear of the payment of his debts, and then it becomes a queſtion what is the mode or expreſſion to give the perſonal eſtate exempt from ſuch payment, when the rule of law is that ſuch eſtate is firſt liable. Perhaps it might not have been unwiſe to have adopted the rule laid down in Fereges and Robinſon, that the teſtator muſt uſe expreſs words for that purpoſe; but it is impoſſible to abide by the opinion given in that caſe, conſiſtently with the rules in other caſes. The ſecond rule is, that where there is a declaration plain, that ſhall ſtand in lieu of expreſs words.

This

This rule has been laid down ſo long, and acted on ſo conſtantly, that if other judges were to put the conſtruction of Wills upon other grounds, how wiſe ſoever it might have been originally to have done ſo, it would be very unwiſe to make the adminiſtration of juſtice take a courſe contrary to former rules. Therefore, if there is a declaration plain, or manifeſtation clear, ſo that it is apparent on the face of the Will that there is ſuch a plain intention, the rule is not to diſappoint, but to carry ſuch intent into execution. But ſhould not ſuch intention manifeſtly appear, there is not a ſingle caſe which does not take it for granted, that the perſonal fund is the firſt appointed by law for the payment of debts."

Samwell and Wake, 1ſt Bro. 144. Sir J. S. deviſed as follows: "I will and deviſe that my debts ſhall be paid, and for that purpoſe I charge all my eſtates with the ſame; and that it may be more eaſily done, that Sir W. W. and J. K. H. ſhall ſell the eſtate, and apply the money to the payment of debts and legacies, and that it may be lawful for them to pay out of the rents and profits, or to raiſe the money by mortgage." Subject to theſe payments he deviſed to the plaintiff, his natural ſon for life, remainder over; the reſidue he gave to the plaintiff.—The bill was filed to compel the truſtees to pay the debts, &c. out of the realty, plaintiff contending he took the perſonalty exonerated from debts, &c. The Lord Chancellor held there was not in this caſe an intent to exonerate the perſonalty ſufficiently

ſufficiently expreſſed—it was to be firſt applied. In Adams and Meyrick, 1 Eq. Abr. 271. P. 13. The deviſe was to truſtees in truſt, that they do and ſhall by mortgage, &c. pay and ſatisfy his debts, &c. His goods at A. he deviſes, then "all the reſt and reſidue of my perſonal eſtate I give and deviſe to my wife."—This deviſe was deemed ſufficiently clear to give the wife the reſidue exempt from charges—Holliday and Bowman, 6th Dec. 1776, cited in Samwell and Wake, 1 Bro. 145. W. C. deviſed a manor to truſtees in truſt to ſell, and directed the monies to be raiſed thereby to be paid in diſcharge of all his debts, and after payment thereof, in the firſt place, to inveſt the reſidue and pay the intereſt to his wife for life, and the principal, after her deceaſe, to his nephew. After ſpecific and pecuniary legacies, he gave to his wife all his goods and chattels, and appointed her executrix.—The Lord Chancellor, after ſome conſideration, decreed the lands to be liable to debts before the perſonalty. The caſe of Ancaſter and Mayer, cited above, was this: C. B. deviſed particular lands to truſtees for 99 years—The truſt was "to pay and ſatisfy all the debts I ſhall owe at my deceaſe." He, in a ſubſequent part of his Will, gave "all my houſehold goods, and all other my goods, chattels, effects, and perſonal eſtate whatever, unto A." Afterwards he appoints the aforenamed truſtees executors, ordering and appointing them to pay, ſatisfy, and diſcharge "all his debts and legacies, as ſoon as they

ſhall

ſhall become due and payable, by ſuch methods, ways, and means, and in ſuch manner as he or they, or their counſel learned in the law, ſhall in that behalf adviſe and think meet."—Then the executors are to ſatisfy themſelves out of *the perſonal eſtate*, or *the truſt term*, for charges relative to proving the Will.—One queſtion was, ſhall the debts be paid out of the perſonalty firſt, or is the truſt term firſt liable? Lords Commiſſioners Aſhurſt and Hotham decreed the perſonalty exonerated.—On a re-hearing before Lord Thurlow, 16th June, 1784, &c. on 5th July, 1785, he decreed the perſonalty liable in the firſt inſtance—the intention to apply the realty in exoneration of the perſonalty was not ſufficiently explicit. In Kidney and Couſſmaker, 1ſt Veſey, jun, 436, 2d Veſey, jun. 267, land was deviſed to be ſold and conſidered as perſonalty—Lord Thurlow in the firſt inſtance, and Lord Loughborough afterwards, determined this to be making the fund ariſing from the ſale liable to all debts. This, as appears, P. 268, againſt the majority of many counſels opinions taken on the caſe.

Perhaps, after reading through theſe caſes, no teſtator will be very fond to truſt to *implied intentions*. An explicit declaration every one can underſtand—implied intentions are one thing to one perſon, another to another. Implied intentions undoubtedly will be beſt diſcovered by thoſe who are well acquainted with the general ſituation of the teſtator, as to family views, family connections, &c.—

But the rule is, that we are not to travel out of the Will, 1 Bro. 466.—" Lord Talbot obſerved, much might ariſe from the examination as to the quantum of the debts and the amount of the perſonal eſtate. Lord Talbot took it as clear that ſuch an examination might be gone into. In Stephenſon and Heathcote it is ſaid expreſsly, no examination can be had. In that caſe Lord Keeper Henley relied much on the wife being executrix. Lord Keeper's obſervation on this caſe was, that the intent of the teſtator muſt be collected from the words of the Will, and from no circumſtances out of it, and upon general principles and rules eſtabliſhed in the caſes—that the court could not go into the teſtator's circumſtances, as it would eſtabliſh a rule not to be adhered to," per Ld. Thurlow.

APPEN-

APPENDIX I.

ON

POWERS OF APPOINTMENT.

A SPECIES of Truſt very uſual in Wills, Marriage-Settlements, and other Conveyances, is a Power of Appointment. This Power, when placed in proper hands, is beyond any other proviſion uſeful in the ſettlement of families, inaſmuch as inſtead of calculations of remote poſſibilities, it is its privilege, from time to time, to act on exiſting circumſtances.—Conſidering Powers of Appointment as highly uſeful, and their doctrine not extenſively known, I hope it will be found that I have not miſemployed a few pages in giving them as clear and familiar an inveſtigation as I am able to do.

WHEN a Power of Appointing is once created, the firſt queſtion that ariſes is, to whom may the appointment extend?—The anſwer to be given muſt depend on the words creating the power. It is alſo to be taken into conſideration, that however liberally the power may be granted, no execution of it is permiſſible which binds up property beyond the periods allowed by Law.

If there is a power to appoint amongſt any deſcription of perſons, an appointment to the children of any of theſe perſons is not good:

As where R. A. gives his wife 600l. to diſpoſe of amongſt his three daughters by Will or otherwiſe, by Lord Chancellor—"If Anne (one of the daughters) had left children, although it would be hard, yet the mother (i. e. Anne's mother) could not give it to them, they not being within the deſcription of the power"—Maddeſon and Andrews, 1 Veſey, 59. The ſame principle is acted on by the Maſter of the Rolls in Alexander and Alexander, 2d Veſey, 640. The mother had power to appoint 6000l amongſt her children; ſhe appointed a certain ſum to one daughter for life, and afterwards to the children of this daughter—which laſt appointment was held void. Whiſtler and Webſter, 2d Veſ. jun. 367, goes on the ſame principle.

But, under ſpecial circumſtances, an appointment may be made to the children of the perſons who are directly the object of the power.

So in Langſton and Blackmore, Ambl. 289—A. (the father) had power to appoint to the children of the marriage —By agreement with Lewis, his eldeſt ſon, he appointed to Lewis for life, remainder to the iſſue of Lewis, and the appointment was held good, as being with the aſſent of the ſon, the appointee:—For, per Lord Chanceller, "If it had been to Lewis *abſolutely*, he might immediately afterwards have ſettled it in that manner."—Alſo in Alexander and Alexander, 2d Veſ. 642, Maſter of Rolls ſays, "The mother *had* a power to do ſomething ſimilar to this, but in another way: For though that power would have enabled her, *for better advancement in marriage*, to make a ſtrict ſettlement, &c."—on which Buller remarks, 2d T. R. 253. in Robinſon and Hardcaſtle. "In Alexander and Alexander the Maſter of the Rolls thought, that if the power had been executed by the mother on the advancement of the daughter in marriage, it might have been ſupported as an execution in ſtrict ſettlement, which muſt have been on account of the conſideration and the mutual conſent of the mother and daughter, and conſidering it as a gift abſolutely from the mother to the daughter, and the ſettlement of that money by the daughter"

I have hitherto ſpoken of appointments of a confined nature, and have ſhewn that even in hard caſes, as in that ſuppoſed by the Lord Chancellor in Maddeſon and Andrews, the power is ſtrictly to be adhered to.

I ſhall next proceed to conſider powers of a more extenſive kind—as where the appointment is, by the terms of it, extendible to "iſſue," not merely to children.—A material obſervation relative to powers of this ſort is, that the limits allowed by Law muſt not be exceeded.

It is an eſtabliſhed principle, that a perſon taking under the execution of a power, takes under the deed by which the power was created. Buller Juſtice ſays, in Robinſon and Hardcaſtle, 2d T. R. 251, "Every execution of a power muſt be coupled with the power itſelf, ſo that thoſe who claim under the execution, muſt derive their title from the power;" and, P. 252, "I take it to be a clear rule of Law, on the execution of a power, that the execution muſt have a reference to the power itſelf, and that a perſon claiming under the execution, takes under the deed by which the power is created, and therefore that the uſes limited by the power muſt be ſuch as would have been good if limited by the original deed."—We may remember, that the rule of Law repeatedly alluded to in the former parts of this work is, that property, whether real or perſonal, ſhall not be ſo ſettled as to be tied up beyond lives in being and 21 years and a few months afterwards.—Then, however extenſively a power may be given, the execution of it muſt be ſuch as ſhall not tye up the property beyond lives in being and 21 years and a few months, *reference being had to the inſtrument creating the power*. The inſtrument creating, and that executing the power, are both to be conſidered as of the period of the former *—and the execution muſt be ſuch

* Between Deeds and Wills there is this material diſtinction: A Deed takes effect immediately on the execution of it, a Will is ambulatory, and waits

ſuch as to be confined to lives in being and 21 years, &c. *reckoning from that period.*

In the late caſe of Routledge and Dorril, 2d Veſey, jun. 357.—On the marriage of Richard Dorril and Eliz. Harcourt, money was ſettled in truſt for the huſband for life, remainder to the wife for life; after the deceaſe of the ſurvivor, to and among all and every the children, grandchildren, or iſſue of the marriage, in ſuch ſhares and proportions, reſtrictions, limitations, and conditions, as the huſband and wife ſhould appoint; in default of ſuch appointment, the ſurvivor to have the ſame powers; in default of appointment by the ſurvivor, amongſt all, &c. who ſhould be living at the deceaſe of the ſurvivor. The huſband died, leaving his wife and four children, Richard, Elizabeth, Frances, and Mary, and having made no appointment.—The appointments made by the widow were as follows: In 1775, 300l. to Frances: In 1776, in conſideration of the marriage of John Edwards and Elizabeth Dorril, ſhe appoints, by the marriage ſettlement, 500l. to Elizabeth immediately on her marriage, to the intent that her huſband may receive the ſame and the dividends to his own uſe:—She alſo appoints 1000l. immediately after her deceaſe, in conſideration of the marriage, to Elizabeth and her huſband for life; after their deceaſe to their children as they ſhould appoint; in default of appointment, equally amongſt them: In 1782, Elizabeth, the widow, by her Will, appoints 1000l. to Elizabeth Edwards for life, then to her children:—She further appoints 500l. to her daughter, then Frances Twiſs, for life, after her deceaſe to her children: One other 1000l. ſhe appoints to Mary for life, remainder to her children by any huſband ſhe may have: 3700l. ſhe appoints to her ſon Richard for life, with power of ſettlement on his wife and children, in caſe he ſhould marry; in default of his ſettling, amongſt the children equally; if none, to himſelf and his executors. Theſe are the principal appointments as far as our preſent ſubject is concerned. In 1791, Elizabeth, the teſtatrix, died.

Several queſtions aroſe on theſe diſpoſitions, and the Maſter of the Rolls, amongſt others, made the following obſervation: "There is no doubt that, under this power, it was competent to the parties (ſc. Richard and Elizabeth, on whoſe marriage the power was created) to have appointed among all the iſſue living at the death of either the huſband or wife, whether the firſt, ſecond, or third degree."

The firſt queſtion that was to be conſidered was the appointments to Elizabeth, the daughter, ſhe only having a life-eſtate with remainder to her children, were they not too remote. The appointments are to be conſidered as ingrafted in the original ſettlement creating the power—Then it ſtands thus—To the father and mother for life, remainder to an unborn daughter for life, remainder to her children—is not this on principle

waits for its effect till the teſtator's deceaſe.—In inquiring therefore into the legality of the limitations we are ſpeaking of, the reference in the caſe of a Deed ſhould be had to the time of its execution, but the reference in the caſe of a Will ſhould be had to the teſtator's death, Add. Notes H. Co. L. S. 463.

principle too remote?—In anſwer it is to be obſerved, the appointments to Elizabeth are of two diſtinct ſpecies. According to the rule laid down in Langſtone and Blackmore, Alexander and Alexander, Robinſon and Hardcaſtle, ſupra, the appointments to Elizabeth on her marriage are good—it is an abſolute appointment to the daughter on her marriage, and a ſettlement by that daughter on her huſband and family in ſuch ways as ſeem to her uſeful and proper. The other appointment to Elizabeth, under the Will of 1782, ſtands very differently. To the limitations created in the Will ſhe is no party, therefore the appointment *to her children* is void as too remote. If it had been to children *living at the grandmother's death*, it would have been good, as veſting after a life in being at the original ſettlement. The appointment to the children of Frances Twiſs is void on the ſame principle. As to the appointment to Mary Dorril and her children, it is clear the appointment to the children is bad—The appointment to Richard Dorril for life is clearly good—The ſubſequent appointment to his children, &c. is clearly void. How the money ill appointed is to go, we ſhall conſider hereafter—we have only conſidered the caſe as relative to remote appointments being good or not.

The ſum of the caſe is this: The words of the power enabled a diſpoſition to any iſſue of the marriage, however remote, but the principle of Law ſteps in and prohibits appointment to any not in being at the deceaſe of the perſons, parties to the original ſettlement—provided the appointees *muſt be* in being at the deceaſe of the ſurvivor, whether children, grandchildren, or great grandchildren, the appointment were good:—So, by the Maſter of the Rolls, Elizabeth Edwards had three children living at the death of Elizabeth Dorril—an appointment to theſe three would have been good; but as the appointment by the Will did not particulariſe theſe, but equally alluded to all the children Elizabeth Edwards might at any time have, the principle of Law was exceeded.

The next point we will conſider is, where the appointment muſt be amongſt *all* the perſons anſwering the deſcription contained in the power, and where it may be confined to ſome of them. There is very little difficulty in making an explicit declaration which will not be liable to miſtakes—ſuch an expreſſion as this can ſcarce be miſconſtrued—"To any one or more, or all of the children of the ſaid marriage, as to the ſurvivor ſhall ſeem good," or as the caſe may be. Another principle, immediately referring to this diviſion of the ſubject, is, that thoſe who are to be benefited ſhall not merely have an eluſory or colourable ſhare. We will alſo here conſider what intereſts may be given (as for life or in tail) under powers of appointment.

In Tomlinſon and Dighton, 1 Wms. 149—The huſband deviſed lands to his wife for life, then to be at her diſpoſal, provided it be to any of his children, if living; if not, to any of his kindred his wife ſhall pleaſe. The children of the marriage are William and Heſter. The wife appoints to Heſter in tail, remainder to William in fee, and this

appointment

appointment was held good, though William might never receive any benefit—and an appointment in tail, under a general power to appoint, was here held good.

Macey and Shurmer, 1 Atk. 389—Shurmer deviſed various lands to his wife, " being well aſſured ſhe would, at her deceaſe, diſpoſe of the lands amongſt all or ſuch of his children as ſhe, in her diſcretion, ſhould think moſt proper, and as they, by their conduct, ſhould deſerve."—By Lord Chancellor, " under the word *ſuch* of his children, the wife of the teſtator had a full power to deviſe the whole to the daughter." There was a ſon.—In Swift and Gregſon, 1 T. R. 432. The father had a power to appoint a real eſtate " to the uſe and behoof of *ſuch child and children*, and for ſuch eſtate and eſtates, intents and purpoſes, as he ſhould at any time, by writing, &c. limit, direct, and appoint."—An appointment to his ſon in tail, with remainder in fee to his other child, a daughter, was held good, as the words implied a power to give to one.—Aſhurſt Juſtice made a diſtinction betwixt real property which was uſually meant to go excluſively to one branch, and perſonalty which was to provide for younger children; but Buller went merely on the words of the power.

We will next conſider ſome caſes in which the perſon poſſeſſing the power has been conſidered bound to give ſhares, not merely colourable, but ſubſtantive to all the objects of the power.

Maddeſon and Andrews, 1ſt Veſey, 58—The huſband deviſes to his wife 6001. to be by her diſpoſed of to and amongſt his three daughters in ſuch proportion, and payable in ſuch manner, as ſhe ſhall think fit. The mother muſt appoint ſomething not eluſory to each daughter, but may appoint unequal ſums. An appointment by a ſtep-mother of an eleventh part to a ſtep-daughter, was held eluſory.—Alexander and Alexander, 2d Veſey, 640. The huſband, by Will, gave his wife a power in theſe words: " And I give unto my ſaid wife the abſolute diſpoſal of the ſaid ſum of 6000l. unto and among ſuch children begotten between us, and in ſuch proportions as ſhe ſhall, by laſt will and teſtament, or by any other deed or deeds, writing or writings, to be executed by her in her life-time, atteſted by two or more credible witneſſes, direct, limit, and appoint."—The Maſter of the Rolls ſaid, " Conſidering the nature of the power, the wife was confined as to the objects to give it to, but left to her diſcretion as to apportioning it among them. In conſequence of this ſhe was obliged to give the whole among the children, every child muſt have ſome ſuch ſhare as ſhe pleaſed, provided not eluſory. If then ſhe might apportion as ſhe pleaſed, it is neceſſarily applied that ſhe might apportion it out in ſuch manner as ſhe pleaſed, conſequently ſhe might give an intereſt for life in a particular ſhare to one child, or limit the capital of the ſame ſhare to another, or even go ſo far as to limit it to a third child on a contingency. Provided ſhe doled out the whole in this various way among the children only, one reſtriction ſhe was under, that ſhe could not have given any one child merely a reverſionary intereſt,

for

for it was intended as a proviſion, and therefore it would be deemed illuſory*.

In Pocklington and Bayne, 1 Bro. 450—the power was to appoint "to all and every the children in ſuch parts, ſhares, and proportions, as the ſaid S. Pocklington, &c &c." He appointed one acre to two children, the remainder to his ſecond ſon, and the whole appointment was conſidered as eluſory and void.

In Briſtow and Warde, 2d Veſey, jun. 337—the power was, after the deceaſe of the wife, "to apply the capital in ſuch manner as John Briſtow ſhould appoint by any deed or writing." He appointed life-eſtates to ſeveral of the children of the marriage who were the objects of the appointment, and they were held well appointed. Two of the appointments were thus: "To his daughter, Ann Margaret Hobart, 1000l upon truſt, to pay the profits and dividends to Henry Hobart, her huſband, during his life—and after his deceaſe, Ann Margaret was to have a life-eſtate, if ſhe ſurvived her huſband. To his daughter, Frances Neave, a ſimilar diſpoſition of 500l. was made. It was argued that theſe contingent intereſts to the two married daughters were illuſory and void. But the Lord Chancellor held it good, as being, in fact, ſuch an intereſt in the wives as they would have taken if the diſpoſition had been to them for life ſimply, without naming the huſbands. If a life-intereſt were given to the wife independant of her huſband's controul, this alſo were good, 2d Veſey, 641.

We will next give a few inſtances of illuſory appointments.

Cragrave and Percoſt, cited in Wall and Thurnborne, 1 Vern. 355—A man leaving two daughters, one by a ſecond wife, gives the ſecond wife power to appoint to them as ſhe ſhould think fit—ſhe apoints 100l. to her ſtep-daughter, 1000l. to her own—this was held eluſory. So in Pawlet and Pawlet, 29,900l. out of 30,000l. appointed to one child, was held void.

But eluſory appointments are in ſome caſes allowed.

So Burrel and Burrel, Ambl. 660—One gave all his real and perſonal eſtate to his wife, to the end ſhe might give his children ſuch fortunes as ſhe ſhould think proper, or they beſt deſerve. A ſon by a former wife, and four daughters by this, ſurvived him. The wife appointed one guinea to the ſon, who was poſſeſſed of 400l. per annum—200l. each to two daughters, the remainder to the other two daughters—the daughters

* In Routledge and Dorril—in default of appointment the property was to go to "all and every the children and grandchildren or iſſue of the marriage which ſhould be alive at the death of the ſurvivor, equally to be divided, ſhare and ſhare alike, the iſſue of any child or children dead ſhall not have greater ſhare than the parent of ſuch children, if living, would be intitled to." A part is unappointed—none of it ſhall go to the children of a parent, being alive, who takes under the non-appointment.

daughters portions, independant of this, were about 500l. each. As the ſon was well provided for, Lord Camden held this diſpoſition juſt—And Lord Chancellor ſays, 3d Bro. 254, in Boyle and Peterborough, "A groſs inequality of diviſion, if accounted for upon honourable motives, could not be held eluſory—And by Lord Chancellor, 1ſt Veſey, 59, "Yet even where but a trifle has been given to one, if that child, by miſbehaviour, deſerved it, though it muſt be very groſs indeed, the court will not vary it."

We will next conſider the doctrine of Cy près.—Where the diſpoſition, as made by the perſon poſſeſſing the power, is in ſome point erroneous, the court of chancery will, in ſeveral caſes, rectify the appointment, bringing it as near to the appointer's deſign as the law will permit.

As the doctrine of Cy près rather refers to the conſtruing of Wills already made, than to the information of thoſe who have the making of Wills in contemplation, I ſhall treat it very briefly. Where there is a power of appointing to any one, and this power has been exceeded by limiting eſtates to the children of that perſon in remainder after his life-eſtate, *but in ſuch a courſe that they would take under the void appointment in nearly ſimilar ſucceſſion as they would have taken had the father been appointed an eſtate tail.* It has been decided that, to accompliſh the teſtator's deſigns, the father ſhall have an eſtate tail.

So in Robinſon and Hardcaſtle, 2d T. R. 241—James, the father, had a power to appoint to his children; he appoints to James, his ſon, for life, remainder to his firſt and other ſons in tail, remainder to his daughters in tail, as tenants in common. The eſtates deviſed in tail to the children of James, the ſon, were beyond the power; but as giving James, the ſon, himſelf an eſtate tail, *was* within the power, and would tranſmit the property to his children in nearly the way pointed out for them to take in the void appointment, to fulfil the teſtator's intent as much as the law would allow, James, the ſon, was held by Buller Juſtice to take an eſtate tail. In Griffith and Harriſon, 737, Lord Kenyon and Groſe Juſtice ſent a certificate to Chancery on the ſame principle.

But in Briſtow and Warde, cited ſup. the appointment was to be to the children. Henry, the ſon, was appointed for life, then to his children as he ſhould appoint to them—for want of appointment they were to take diſtributively per Capita, i. e. ſhare and ſhare alike.—During the argument, the Lord Chancellor ſaid, Why may not I conſtrue it an eſtate tail for Henry as to the land? But he afterwards abandoned the idea and ſaid, "No eſtate tail is given, nor any intention of that ſort expreſſed; but the children would take by the appointment, or for want of it diſtributively per Capita."

In Routledge and Dorril the Maſter of the Rolls denies this doctrine to extend to perſonal property.—"This is a perſonal eſtate firſt given

for life to the parent, an object of the power, then equally, or as he ſhall appoint, to the children who are not objects of the power. I am deſired to execute that Cy près. How can I do that? To effectuate ſuch intention I can only give it to him abſolutely; and then it would not go to them in a courſe of deſcent, but would go to his executors, and be liable to his debts."

Where there is an appointment void as to part, the appointment, as far as it is good, ſhall ſtand, and the void part be conſidered as null, and ſhall go as in default of appointment, Tyrconnel and Ancaſter, 2d Veſey, 503. Hervey and Hervey, 1 Atk. 569.

The Lord Chancellor ſays, in Briſtow and Ward, 2d Veſey, jun. 350, "I aſked whether there was any caſe where the whole was diſtributed and ſet looſe, as if no appointment had been made, becauſe part of the appointment was bad? That propoſition therefore is untenable, that in caſe of a flaw in the execution as to part, the whole muſt be void—all that is well appointed muſt ſtand."—"The conſequence is, that the remainder muſt be divided as in default of appointment." It was decided both in this caſe and in Wilſon and Piggot, 2d Veſey, jun. 351—that the void or unappointed reſidue ſhould be divided, as the whole would have been if no appointment had been made, i. e. the perſons to whom appointments had been made came in for their ſhare of the unappointed part, ſo in Routledge and Dorril.

In 2d Veſey, 644, the Lord Chancellor ſays, "That where there is a complete execution of a power, and ſomething ex abundanti added which is improper, there the execution ſhall be good, and the exception only void: but where not a complete execution of a power, where the boundaries betwixt the exception and the execution are not diſtinguiſhable, it will be bad." The caſe on which the Maſter of the Rolls made this obſervation was where, under a power to appoint to children, an appointment to "Francis, his wife, and children," was held good as to Francis—the exception to wife and child, who were not objects of the power, was deemed void.

Where there is a power to appoint amongſt any perſons, but if theſe perſons ſhould fail, to others, and no appointment is made, the firſt deſcription of perſons ſhall take equally, though nothing is ſaid as to what ſhall be done in default of appointment, Witts and Boddington, 3d Bro. 95 So in Madeſon and Andrews, the mother was deviſed 600l. to be diſpoſed of amongſt her three daughters, a part unappointed was divided equally.

There is no neceſſity that all the appointments under a power ſhould be made at once—ſuch a determination were indeed entirely contradictory to the moſt uſeful effects of powers of appointment.

By Lord Kenyon, in Doe and Milbourne, 2d T. R. 725—"I agree with the argument at the bar, that a power may be executed at different

ferent times, if not fully executed at firſt, provided the party in whole execution do not tranſgreſs the limits of the power." So by Maſter of Rolls, in Wilſon and Piggot—"I am glad I have been furniſhed with the determination in Briſtow and Ward, which is an expreſs authority that under ſuch a power whether in the ultimate diſtribution each child muſt be included for ſome ſhare or not, the party may execute his power by ſeparate deeds, which do not give each child a ſhare." "Maddeſon and Andrews have completely decided that partial appointments may be made, and upon the caſes determined it is univerſally admitted, that if a ſubſtantial ſhare is given to each, it may be by different inſtruments at different times."

Where there is a power to appoint and to revoke the appointments from time to time, and to declare new uſes, and an appointment and then a revocation is made, and new uſes appointed, but no further power of revocation annexed to theſe new uſes, the power of revocation is at an end; to continue it, it were neceſſary to have reſerved a power ſo to do on the firſt revocation, Hele and Bond, Pr. Ch. 474, 2d Veſey, 211—ib. 77.

There are ſome caſes in appointments of a very different nature from thoſe already diſcuſſed—where there is a power to appoint abſolutely, without any reſtriction as to the perſons to whom the appointment is to be made—as in this caſe the perſon poſſeſſing the power may appoint to himſelf, his heirs, executors, &c. he is, as it were, complete owner.

One effect of this intereſt is the creation of eſtates which could not have been created in the deed giving this intereſt—H. Co. L. 381. b. note to 379. b. "If the objects of the powers be not reſtrained to any particular deſcription of perſons, but deſigned generally to be ſuch perſons as the party to whom the power is given ſhall appoint, there is no queſtion but he may appoint life eſtates with remainders over in the ſame manner as he might do by a ſubſtantive original conveyance, notwithſtanding the perſons to whom the life eſtates are appointed were not in being at the time of the execution of the conveyance in which the power is contained." The principle on which this is formed is obvious enough. The man who has an unreſtrained power of appointing has the eſtate, as it were, in his own hands, and any limitations he may create have their origin in him only—he finds the property free, he begins to bind it; conſequently from the period of his appointment the reſtraints begin to run, and from that they are to be reckoned.

Another conſequence of this power is, that whether appointed to creditors or no, they can come againſt the property as if it were abſolutely his own, and previous to any appointment he may have made, though to ſiſters, Bainton and Ward, 2d Atkins, 172, or a daughter, 2d Veſey, 9, per Lord Chancellor, 2d Atk. 172. "If a man has power to diſpoſe by appointment of a reverſion in fee, and makes no diſpoſition of it, yet it ſhall be aſſets to ſatisfy ſpecialty creditors," Pack and Bathurſt, 3d Atk. 269, Troughton and Troughton, ib. 656.

We will next conſider in what caſes defective executions of powers will be aſſiſted, and in what not.

Tollet and Tollet, 2d Wms. 489—The huſband had power to make a ſettlement on his wife *by deed under his hand and ſeal*. He had made no proviſion for his wife, and by *will*, under his hand and ſeal, he deviſed part of the lands within his power to his wife for life. Maſter of the Rolls—"This is a proviſion for a wife who had none before, and within the ſame reaſon as a child not before provided for—and as a court of equity would, had this been the caſe of a copyhold, have ſupplied the want of a ſurrender; ſo where there is a defective execution of a power, be it either for payment of debts, or proviſion for a wife or children unprovided for, I ſhall equally ſupply any defect of this nature. The difference is between the *non execution* and a defective execution of a power This court will not help the non execution of a power." In Chapman and Gibſon, 3d Bro. 231, Maſter of the Rolls ſays, "I think the execution of a power and the ſurrender of a copyhold go hand in hand." He had ſaid in the laſt page, "The next claſs of caſes is thoſe where there is a natural obligation. Formerly ſome Judges have thought otherwiſe, but it is now ſettled the court will not inquire into the quantum of the proviſion. It is ſufficient the teſtator is acting in diſcharge of moral or natural obligations; and it is very difficult for the court to enter into ſuch inquiry, the father muſt be the beſt judge."

In Cotter and Layer, 2d Wms 623—A woman with power to appoint by writing in preſence of three witneſſes, appoints on her marriage in preſence of two As marriage was a valuable conſideration, the defect was ſupplied in Chancery. 1 Atkins, 562, Lord Chancellor ſays, "It has been rightly obſerved at the bar, that a court of equity will ſupply a defective execution of a power as well in the caſe of younger children and a proviſion for a wife, as in favor of purchaſers or creditors."

In Dormer and Thurland—A. had a power to appoint 200l. by his laſt Will *under hand and ſeal*. He appointed to ſeveral of his relations, but neglected the ſealing—and the appointment being merely voluntary, and ariſing from no duty incumbent on it, the defect was held fatal. Roſs and Ewer, 3d Atkins, 155, was ſimilar to this caſe. Wagſtaff and Wagſtaff, 2d Wms. 258—A man having a truſt eſtate and a power to appoint, appoints by a Will atteſted only by two witneſſes—This is bad. In Mac Adam and Logan, 3d Bro. 310—The ſurvivor of huſband and wife had power to appoint 3000l. to ſuch child or children, &c. as to the ſurvivor ſhould ſeem good—The appointment to be under hand and ſeal. The huſband and wife, during their joint lives, appointed the money to four out of their five children, but without ſeal. In default of appointment the money was to go amongſt the children of the marriage equaliy. The Lord Chancellor held the appointment bad, as being by both, not by the ſurvivor. He alſo ſeemed to think the want of ſealing fatal, as this caſe was merely amongſt children who had all equal equities—it was not as between children and ſtrangers.

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As perhaps in caſes relative to powers of appointment many will ariſe which cannot eaſily be claſſed in either of the deſcriptions mentioned, from their ſo much partaking of both as to be of a doubtful nature, I ſhould ſtrongly recommend a very minute attention to the requiſites ordered by the power, and then all is ſafe.

We will conclude this ſubject by noticing ſeveral miſcellaneous points.

Sympſon and Hornſby, Pre. Ch. 452—The huſband had given his perſonal eſtate to ſuch uſes as the wife, with conſent of his truſtees, ſhould direct—an appointment without their conſent is bad.

Beale and Beale, 1ſt Wms. 244—The power was to appoint 2000l. out of an eſtate to younger children living at the appointer's death—he left one daughter and his wife enſient with another daughter—theſe were all the children—Per Cur. the eldeſt daughter, though born firſt, when there is a ſon, has often been ruled to be a younger child—every one but the heir is a younger child—Here the eſtate goes to a remainder man, who is hæres factus " (thereby made heir)"—both children were deemed competent to take under the appointment.

Saville and Blacket, 1 Wms. 777—A. was tenant for 99 years, if he ſhould ſo long live, with a power to charge the lands. He joins perſons in remainder in ſuffering a recovery with new uſes declared. He has extinguiſhed his power of charging. " Having joined in a new ſettlement, he muſt not derogate from his own grant."

For the ſake of ſecurity it is wiſeſt, on any appointment by Will, to refer explicitly to the power.

Molton and Hutchinſon, 1 Atk. 558—J. C. gave 1000l. S. S. Stock to F. C. for life, and gave him a power to diſpoſe of 400l. thereof.—F. C. made his Will, and after giving ſeveral legacies, he diſpoſes of the reſt and reſidue of his perſonal eſtate to his neareſt relations.—This was no appointment of the 400l. So in Buckland and Barton, 2d H. Bl. 136—a power to appoint 100l. by Will was not executed by a deviſe of the reſidue of all perſonal eſtate—and Heath Juſtice ſaid, the true rule, as to powers of appointment by Will, is that where one has a power of appointment by Will, but makes a Will without any reference to the power, the appointment ſhall have no effect, unleſs the Will would otherwiſe have no operation. So Caſwell, E. P. 1 Atk. 559—where Lord Chancellor ſays, " tho' a man may execute a power without reciting or taking the leaſt notice of the power, yet it is neceſſary he ſhou'd mention the eſtate which he diſpoſes of, and muſt do ſuch an act as ſhews he takes notice of the thing which he had a power to diſpoſe of."

A power cannot be delegated to another, 2d Atkins, 88. Ingram and Ingram. J. had a power to diſpoſe of a reverſionary intereſt in a copy-

hold

hold amongſt the iſſue of the marriage, he by Will delegates this power to his wife. Per Lord Chancellor this power is not tranſmiſſible. So 2d Veſey, 643—A perſonal eſtate was given to ſuch charitable uſes as Dr. Berriman ſhould appoint, he directed the money to be applied as another Dr. Berriman, his brother, ſhould appoint. This the court would not allow as " delegatus non poteſt delegare."

If an appointment is made to a perſon in a Will, and the perſon dies before the teſtator, the appointment is lapſed—Oke and Heath, 1ſt Veſey, 135. Scroggs and Scroggs, 272, an appointment made under miſrepreſentation was ſet aſide.

If there is a void appointment and a ſubſequent appointment, not neceſſarily in itſelf void, depending on the void appointment, the ſubſequent one muſt fall, together with the firſt—As where an appointment was to his ſon J. for life, remainder to his firſt and other ſons in tail, remainder to his daughter Elizabeth in fee. The eſtates tail to the ſons of J. being void, the remainder in fee is void alſo, Robinſon and Hardcaſtle, 2d T. T. 241. This doctrine is alſo held by Maſter of Rolls, 2d Veſey, jun.—and he holds it to be the ſame whether perſons pointed out for the void intereſt ever come into being or no—the limitation over is void at any rate.

APPEN-

APPENDIX II.

PRECEDENTS.

(The figures refer to the pages in the body of the work particularly connected with each deviſe.)

DESCRIPTION OF TESTATOR.—See P. 16.

I, JAMES ROBERTS, of Croyden, in the County of Surry, Gent. do make this my laſt Will and Teſtament, in form and manner following.

I, James Traverſe, now of Green Hall, in the County of Lincoln, late of Dover-Street, in the County of Middleſex, Gentleman.

I, Rebecca Rawlins, Spinſter, late of Norfolk-Street, Strand, in the County of Middleſex, now of Chatham-Place, Black-Friars, in the ſame County.

I, Thomas Royds, of the City of York, Coach-Painter.

CHARGING ESTATES WITH DEBTS AND LEGACIES—P. 68.

Imprimis—I do will, order, and direct, that all my juſt debts, funeral expences, and the charge of proving this will, be by my executors hereinafter named, paid and diſcharged out of my perſonal eſtates—P. 68.

With the payment of my juſt debts I charge my real eſtates, whatſoever and whereſoever, in aid of my perſonal—70.

Whereas it is my intention that my perſonal eſtates ſhould go undiminiſhed in the courſe hereinafter pointed out in this my Will, I do make all my real eſtates liable, in the firſt inſtance, to all my debts—70.

And whereas it is my intention that the bequeſts and deviſes hereinafter contained ſhould all, as far as may be, take effect, to that intent I deviſe that all my debts, as well on ſimple contract as otherwiſe, ſhall be paid in the following manner, that is, one-third of ſuch my debts ſhall fall as a charge on my perſonal property, and the remaining two-thirds ſhall be charged on my real property, whether particularly deviſed or not, in ſuch manner that all perſons ſucceeding to any part of my ſaid real property, whether as heir at law, or deviſee under this my Will, ſhall contribute in equal proportion.

And

And whereas my perſonal property may be found inſufficient to diſcharge all my juſt debts, I do hereby deviſe all my eſtate called Headlands, to A. B. and C. D. Eſqrs. and their heirs, in truſt nevertheleſs and for the intents and purpoſes hereinafter mentioned, that is to ſay, that they and the ſurvivor of them and his heirs ſhall, by ſale, mortgage, leaſe, or out of the rents and profits thereof, or by what other method or methods to them or the ſurvivor of them and his heirs ſhall ſeem good, raiſe ſufficient ſum and ſums of money to diſcharge all ſuch of my debts as my perſonal eſtate ſhall be unable to pay—72.

And if my perſonal eſtate, after payment of my juſt debts, ſhould be inſufficient to ſatisfy the legacies herein deviſed, in ſuch caſe it is my will that ſuch part of my legacies as ſhall remain unpaid ſhall be charged on my real eſtates, as well thoſe which are ſpecially deviſed as thoſe which are not, all ſuch my eſtates to contribute equally according to their ſeveral values—69.

Subject to my debts and legacies, in aid of my perſonal eſtate, I deviſe all that my meſſuage and tenement, &c.

REFERENCE TO PRIOR WRITINGS—P 3.

Whereas in a certain book bound with blue Morocco leather and claſped with ſilver, which is folded up in paper, and ſealed at both ends with my family ſeal, which book, for better ſecurity, I have depoſited —— there is expreſſed a ſeries of limitations of my eſtate at Blackacre. Now it is my will, and I hereby deviſe that my ſaid eſtate at Blackacre ſhall go according to the ſaid limitations contained in the ſaid book by me here referred to; and, for the greater certainty relative to the aforeſaid book, I have written it all with my own hand, and have ſigned every leaf of it, and further have at the bottom of each page noted down all the raſures and interlineations which I have at any time made.

WILL OF REALTY BY A MARRIED WOMAN—P. 6.

Let the teſtatrix refer to the origin of her power of deviſing, whether by conveyance of the eſtate to truſtees, covenant by the huſband prior to marriage, or fine after marriage.—If the deeds are eaſily to be come at, they may be accurately recited, as, " Whereas by a certain deed bearing date —— and prior to my marriage with my now huſband, John Spinks, the aforeſaid John Spinks did covenant that, &c. notwithſtanding coverture, &c."—But if the wife cannot readily obtain the deeds containing the origin of her power, any explicit declaration of her deſign will ſuffice—As, " I Elizabeth Jones, wife of, &c. having reſerved to me, by my marriage ſettlement, a power of diſpoſing of my real eſtates, by any Will executed to paſs real eſtates, at any time, notwithſtanding my coverture, do hereby, in purſuance and exerciſe of ſuch power and authority, and by force and virtue of all and every the power and powers, authority and authorities, in me being or enabling

me

me thereto, make my laſt Will and Teſtament in manner following.—If the wife is authoriſed to deviſe perſonal property, the ſame reference muſt be made; and if her power ariſes from the mere circumſtance of her huſband's aſſent to the individual Will, ſhe may allude thereto in any ſuch way as this.

I, Jane Thompſon, of the City of Litchfield, being empowered and authoriſed by my huſband to deviſe certain property, (deſcribe it) notwithſtanding my coverture, in token of wh ch his aſſent he has hereunto ſet his hand, do hereby deviſe, &c.—P. 8

WILL OF COPYHOLDS OF MARRIED WOMEN—P. 6.

Whereas my copyhold eſtate at R. has, according to the cuſtom of the manor in caſes of femes coverts, been ſurrendered to ſuch uſes as I ſhould by Will appoint, I hereby direct and appoint that the ſame ſhall go to A. for life, &c.

WILL OF PERSONALTY OF A MARRIED WOMAN WITHOUT HER HUSBAND'S CONSENT—P. 8.

I, Mary Jones, having ſaved divers ſums of money out of the annual allowance to which I am intitled by my marriage ſettlement, do hereby make diſpoſition thereof as by law allowed, notwithſtanding my coverture.

And whereas I am executrix of Jones Roberts, I do hereby deviſe all the monies to which I am intitled as ſuch, and alſo all the truſt ariſing to me under the Will of the ſaid Jones Roberts, to R. H. his executors and aſſigns—8.

DEVISE OF COPYHOLDS—P. 11.

Whereas I am poſſeſſed of a certain copyhold farm ſituate at Hampſtead, in the County of Middleſex, and now or late in the occupation of George Green, which ſaid tenement has been ſurrendered to the uſe of my Will, I deviſe it to A. B. &c.

Whereas I, Benjamin Thompſon, am poſſeſſed of a copyhold houſe ſituate at Croyden, in Surry, and now or late inhabited by A. B. which ſaid copyhold tenement I have not ſurrendered to the uſe of my Will, whereby the ſame will deſcend to my heir at law contrary to my wiſhes, now I do hereby will, order, and direct, that my ſon J. my heir at law, or his heirs, or ſuch perſon as at the time of my deceaſe ſhall happen to be my heir, or the heirs of ſuch perſon, when and as ſoon as he, ſhe, or they ſhall attain the age of 21 years, ſhall and do, upon requeſt and charges in the law of the perſons intereſted and requeſting the ſame, paſs ſufficient ſurrenders, and do all other acts in law required and neceſſary for eſtabliſhing and confirming the ſeveral eſtates herein limited to them reſpectively, and the uſes of ſuch ſurrenders I

do hereby declare to be as follows—P. 12. This is taken nearly word for word from Wardel and Wardel, 3 Bro. 116. in which caſe it is to be remembered the heir at law was deviſed an eſtate tail in other property.

DEVISES AMONGST RELATIONS—P. 18.

I ſhall content myſelf with giving the form of the deviſe in Bennet and Honeywood—And further I give to my "ſaid executors 20,000l. upon truſt, to diſtribute and diſpoſe of the whole of the ſaid ſum, and the intereſt and improvement to be made thereof, to and amongſt ſuch of my relations by conſanguinity, and not by marriage, who ſhall not appear to my ſaid executors to be worth each perſon more than 2000l. and who, within two years next after my deceaſe, ſhall apply, or being minors or otherwiſe incapable of applying in their own perſons, ſhall cauſe application to be made, or have application made, on their reſpective behalfs, to my ſaid executors, for the benefit, or to have a ſhare of, or to participate in, that legacy or donation, ſuch diſtribution to be made amongſt ſuch of my relations aforeſaid, at ſuch times and in ſuch manner and proportions or diſproportions as my executors in their diſcretions judge to be moſt proper."

DEVISES TO CHILDREN—P. 17.

I give to each of the children of Jonas Raper, now living, 20l. and if it ſhould happen that any of theſe children ſhould die before me, I give the ſhare or ſhares of any child or children ſo dying to be equally divided amongſt ſuch as ſhall ſurvive me, provided that if any child or children ſo dying before me leave iſſue which ſhall be alive at my death, the ſhare of ſuch child or children ſo leaving iſſue ſhall go to ſuch iſſue as it would have done in caſe of the parent of ſuch iſſue having come into poſſeſſion of his or her legacy.

I give to every child of A. B. which ſhall be living at my death, whether born after the making of this my Will or before, the ſum of 20l each—and if, at the time of my death, any child or children of B. ſhall have died leaving iſſue living at my death, I deviſe what would have been the ſhare of ſuch child or children had they ſurvived me, to the iſſue of ſuch child or children, ſuch iſſue to take in ſuch ſhares and proportions as if the legacy of their reſpective parents had come into poſſeſſion and been diſtributable according to the Statute of Diſtributions.

I give to each of the children which A. B. has, or ſhall at any future time have, 20l.

DESCRIPTION OF PROPERTY DEVISED REAL—P. 20.

I give and deviſe all that my meſſuage or tenement, land and hereditaments, with the appurtenances, ſituate, lying, and being in the pariſh of Grayſtock, in the county of Nottingham, and now in the tenure

nure or occupation of Richard Jones, yeoman.—All my eſtate at R. now or late in the occupation of R. H. I give to B.—See P. 21.

PUBLICATION AND ATTESTATION—P. 2—23.

In witneſs whereof I the ſaid John Doe have hereunto ſet my hand and ſeal this 1ſt Day of April, in the year of our Lord 1796.

Signed, ſealed, publiſhed, and declared by the above-mentioned John Doe, as and for his laſt Will and Teſtament, in preſence of us who at his requeſt, *and in his preſence*, have ſubſcribed our names as witneſſes thereto. JOHN DOE. (Seal)

JOHN DEN,
RICHARD FEN,
RICHARD ROE.

REPUBLICATION—P. 26.

Let the teſtator take his Will in his hand, and declare it to be his laſt Will in preſence of three witneſſes, and note the declaration thus: Whereas I John Doe, the teſtator named in this Will, have republiſhed the ſame, with an intent thereby to make void all other Will and Wills at any time heretofore by me made, and to confirm and eſtabliſh this which I have declared to be my laſt Will in preſence of John Jones, Richard Bones, and Samuel Stones, whom I have deſired to ſubſcribe their names as witneſſes hereto, and in witneſs whereof I the ſaid John Doe have hereunto ſubſcribed my name this 2d day of April, in the year of our Lord 1796.

JOHN DOE.

Signed by the ſaid John Doe, in preſence of us who at his requeſt and in his preſence have ſubſcribed our names as witneſſes to the above republication.

JOHN JONES,
RICHARD BONES,
SAMUEL STONES.

ATTESTATION IN CASE OF PERSONALTY—P. 27.

As the teſtator may have property which he is not authoriſed to appoint, except under ſeal and in preſence of a certain number of perſons, he may follow the publication in caſe of real property, ſupra—but in general the name of the teſtator, ſigned in preſence of two witneſſes, and an atteſtation by them of ſuch ſigning, will amply ſuffice. In witneſs whereof this (day, month, year) I have hereunto ſet my hand,

JOHN DOE.

Signed by the above-named teſtator in our preſence,

RICHARD ROE,
JOHN DEN.

CODICIL—P. 28.

Whereas I, John Doe, of Fleet-ſtreet, in the City of London, money-ſcrivener, have duly executed my laſt Will, bearing date the 1ſt of April, 1796, and thereby given my freehold eſtate at Blackacre to A. and his heirs, now I do hereby revoke the ſaid deviſe of Blackacre, and do hereby deviſe the ſame to Richard Jones and his heirs—I alſo revoke the legacy of 50l. given to my niece, Rebecca Racket; and whereas in my Will aforeſaid I have nominated and appointed A. B. and C. D. to be my executors, I do hereby revoke and annul ſuch appointment, and I do hereby conſtitute and appoint Jane Thompſon my ſole executrix of my laſt Will and of this Codicil, and I do ordain this writing to be a Codicil to my ſaid Will, and that the ſame ſhall be annexed to and taken as part thereof, and do confirm my Will in every particular thereof that is not hereby altered or revoked.—In witneſs whereof I have to this Codicil ſet my hand and ſeal this 3d day of April, in the year of our Lord 1796.

Signed, ſealed, declared, and publiſhed by the ſaid John Doe as and for a Codicil to be annexed to his laſt Will, and to be taken as part thereof, in our preſence, who, in the preſence of the teſtator, have hereunto ſet our names as witneſſes thereof,

JOHN DOE. (Seal)

RICHARD WINN,
JOHN DAY,
ROBERT LITTLE.

INTEREST DEVISED IN REALTY—FOR LIFE—IN TAIL—P. 29.

My freehold tenement at ——— I give to William Bolt for and during the term of his natural life.

My farm called Blackacre, now in the occupation of Richard Jones, containing 80 acres, be the ſame more or leſs, I give to Ralph Watſon and the heirs of his body.

To Ralph Watſon and the heirs male of his body.

To Ralph Watſon and the heirs female of his body.

To Ralph Walſon and the heirs of his body by Ann his preſent wife.

As to deviſes to children after a life eſtate given to the parent, ſee p. 30. and the formula, 31.

3d—Repeat the formula, No. 1. to "defeated, barred, or deſtroyed"—then go on—and immediately from and after the deceaſe of the ſaid A. I give and deviſe the aforeſaid eſtates to and amongſt all the daughters of the ſaid A. equally, as tenants in common, and to the heirs of their bodies.

This

This form, No. 3. makes no reference to any ſons of A.—if they are meant to take firſt, then the daughters, the form, No. 1. muſt be continued by adding—" and for default of ſuch iſſue, then I give and deviſe all my ſaid eſtates, &c." as here.

It is to be obſerved, that in No. 1. nothing is ſaid as to the profits during the period the truſtees may hold the eſtate on any forfeiture. The teſtator may deviſe them to be paid to the perſon committing the forfeiture, to be enjoyed by the truſtees themſelves, or to accumulate till the firſt perſon in remainder can take, and to go to ſuch perſon.

4th and 5th—If the daughters are to take on failure of the ſons iſſue, continue formula 1ſt, " and in default of ſuch iſſue, then I give the eſtates aforeſaid to his firſt and other daughters, &c." as the formula is with regard to ſons; only, if formula 4th is meant, " male" muſt be left out after " heirs"—if the 5th, it muſt be retained.

But if the daughters are to take whether there are ſons or no, then formula 1ſt, as it now ſtands, is not to be uſed at all, but is to be altered by ſubſtituting " firſt and other daughters" for firſt and other ſons, and retaining " heirs male," or " heirs of the bodies" ſimply, as the deſign may be.

6th—And immediately from and after the deceaſe of the ſaid A. I give the premiſes aforeſaid to ſuch of his ſons as ſhall then be ſecond in ſeniority, and to his eldeſt daughter equally, as tenants in common, and the heirs of the bodies of ſuch ſecond ſon and eldeſt daughter—To all his ſons and daughters, as tenants in common, and the heirs of their bodies—To all his ſons and the heirs of their bodies, &c. as the teſtator pleaſes.

7th—And immediately from and after the deceaſe of the ſaid A. I give the eſtate aforeſaid to ſuch perſon or perſons as may anſwer the deſcription of heir of the ſaid A. if more than one, as tenants in common, and the heirs of ſuch perſon or perſons—To the eldeſt ſon of the ſaid A. and his heirs—To ſuch ſon of A. as at his death ſhall be his eldeſt living ſon, and his heirs—provided that if any ſon deceaſed was older than ſuch eldeſt living ſon, and has left iſſue living at the deceaſe of A. the eſtate aforeſaid ſhall go to the heir of the body of the eldeſt ſon leaving iſſue living at the death of A. and the heirs of ſuch heir of the body.

EXECUTORY DEVISES—P. 35.

My freehold tenement at Whiteacre I deviſe to my daughter Ann on her marriage, and to her heirs.

My freehold houſe at B. now in the occupation of R. I give to my ſon John and his heirs; but in caſe he die before 21, and without iſſue of

of his body lawfully begotten, then and in ſuch caſe I deviſe the ſame to my ſon Edward and his heirs.

My lands and tenements ſituate, lying, and being in the pariſh of R. I give to the firſt ſon of A. B. which ſhall attain the age of 21, and his heirs, or, and the heirs of his body.

My lands, &c. I deviſe to J. B. on his attaining the age of 21, or having iſſue of his body lawfully begotten, whichever ſhall firſt happen, and the heirs of his body; and on the deceaſe of the ſaid J. B. without iſſue, whether he ſhall have come into poſſeſſion of the ſaid eſtate or not, I give the ſame to Martha Jenkins and her heirs.

DEVISE OF PERSONALTY—SPECIFIC OR GENERAL—P. 46.

The furniture of my houſe at Croyden I give to B. but it is not my meaning by this bequeſt that plate, linen, china, glaſs, or books, ſhould paſs.

My plate, houſehold linen, books, china, and glaſs, I give to R.

All my goods and chattels commonly made uſe of at my houſe in R. alſo ſuch horſes, cows, oxen, carriages, and farming utenſils as ſhall be there at the time of my death, I give to B. but not deſigning to include in this bequeſt any money, notes, or ſecurities for money, that may be in my houſe at R.

My rings, jewels, and other perſonal ornaments and cloaths, I give to N.

I do not pretend that the above forms are, nor am I aware of any other that will be, altogether clear of doubt; they may, however, ſerve to aſſiſt the teſtator in conſidering what expreſſions his particular caſe demands.

I give to B. 100 l.

I give to C. 200 l. and if it ſhould happen that C. dies before me, in ſuch caſe I give it to his executors and adminiſtrators, to the intent that it ſhall be by them diſpoſed of in the firſt place towards paying the debts and legacies of the ſaid C. if need be; if not, that they ſhall apply and diſpoſe of it to ſuch uſes, purpoſes, and to ſuch perſons, as the reſidue of his perſonal property has or ſhall be applied or diſpoſed of to—58.

DEVISES WITH RESTRAINTS ON MARRIAGE—P. 51.

I give my niece, Jane Metcalf, 200 l. but with this condition annexed, that ſhe ſhall not marry under the age of 21, without the conſent of

A.

A. and B. and on her marriage without the conſent of A. and B. before ſhe attains the age of 21, I give her legacy of 200l. to Tom o'Stiles.

And my ſaid eſtate of Sevenoaks I charge with 2000l. to be paid to my niece, Jane Aubrey, on her attaining the age of 21, provided ſhe ſhall not before that period have married without the conſent of her mother; and if, prior to the age of 21, ſhe ſhall have married without the conſent of her mother, then and in ſuch caſe it is my will that the above charge of 2000l. on my ſaid eſtate ſhall become null and void.

DEVISE OF PERSONALTY IN REMAINDER—P. 52.

My houſehold goods, &c. &c. at A. I give to B. for life, and at his deceaſe I give the ſame to and amongſt his children, ſhare and ſhare alike.

I give my 1000l. three per cent. conſols to B. for life; and if he die leaving iſſue living at his death, I give it to ſuch iſſue, in ſuch ſhares and proportions as they would have taken under the ſtatute of diſtributions in caſe they had ſucceeded to the ſame on the death of B. without a Will; but if B. leave no iſſue living at his death, then I give the ſaid 1000l. to C.

I give 20l. each to all and every the children, grandchildren, or great grandchildren, of my ſon John, which ſhall be living at his death.

LEGACIES IN SATISFACTION OF A DEBT—P. 55.

I give my friend, Thomas Jones, 500l. not with intent to ſatisfy a claim he has on me to that or any other amount, but freely as a legacy.

Whereas by marriage articles I am bound to give my daughter Ann 10,000l. I do hereby, in addition to what ſhe is entitled to under ſuch articles, give and bequeath to her one other ſum of 10,000l.

DEVISE OF REALTY LAPSED—P. 56.

Whereas I have in my Will (of ſuch a date) given my freehold eſtate to B. and the heirs of his body, and in default of ſuch iſſue to C. and the heirs of his body, and whereas B. the former deviſee of this my eſtate, is dead, leaving iſſue of his body, by which his death the deviſe to him and his iſſue is become a lapſed deviſe, now I do hereby re-eſtabliſh the ſame, and give my ſaid eſtate to the heirs of the body of the ſaid B. and in default of heirs of the body of B. to C. and the heirs of his body.

REVOCATION OF A DEVISE—P. 58.

If the revocation of a Deviſe or of a Will be made by another Will, ſuch Will muſt be ſigned in the uſual way. If it be made by any inſtrument not a Will, it muſt be ſigned by the teſtator ſo revoking in preſence

preſence of three witneſſes, who are to atteſt ſuch ſigning, but their atteſtation is not neceſſary to be made in the teſtator's preſence.

Whereas I, John Doe, of Richmond, in the County of Surry, did, by my laſt Will, bearing date ——— (or if teſtator does not know the date) did, by a certain Will heretofore made, deviſe to Thomas Abney and his heirs my eſtate at Blackacre, now I do hereby totally revoke, make null and void, the ſame deviſe.—In witneſs whereof I do hereunto ſet my hand this day, month, year,

JOHN DOE.

Signed by the ſaid John Doe, in the preſence of us who, at his requeſt, have hereunto ſet our names as witneſſes to the above revocation,

RICHARD ROE,
JOHN DEN,
RICHARD FEN.

If John Doe had gone on to deviſe Blackacre to ſome one elſe, in ſuch caſe the witneſſes to what would *then* be a Will or Codicil, muſt ſign their atteſtation in the preſence of John Doe—vide ſupra—and p. 2. and 58. note.

If the teſtator is minded to revoke a Will in toto, his beſt way is to burn it, alſo any duplicate of it—but this is ſometimes impracticable, as it may be in cuſtody at a diſtance, or the teſtator from his own reſidence, &c.

Whereas I, John Doe, am diſſatisfied with the diſpoſitions of my property which I have heretofore made by Will, I do hereby revoke, annul, and make void, all Wills and Teſtaments by me at any time made. Signed and atteſted as the laſt form.

A revocation of a Will, or particular bequeſt of perſonalty, does not require the ſame atteſtation—but it muſt be in writing, except the following forms are uſed—59.

Whereas John Doe was deſirous to revoke certain bequeſts made by him in his Will, but being infirm in health, was not able to do the ſame in writing, he hath by word of mouth revoked all legacies left by him to A. B. alſo he hath declared that the legacy of 20l. given to D. ſhall not ſtand good.—This his revocation of theſe his bequeſts is here put into writing at his requeſt.

The above revocation of the legacies to A. B. and D. was committed to writing, in the words above, in the life-time of the ſaid John Doe, and read to and allowed and approved of by him in our preſence,

RICHARD ROE,
JOHN DEN,
RICHARD FEN.

Whereas

Whereas ſince the making of my Will, wherein is deviſed 500l. to my niece, Sarah Jones, I have given her divers ſums of money, amounting to 500l. at leaſt, whereby it might be in doubt whether the ſaid legacy of 500l. was not become null and of no effect—my deſign is, that notwithſtanding any ſum or ſums of money I may have given her, ſuch legacy of 500l. ſhall ſtand good.

Whereas in my Will I have given A. B. 100l. I do hereby in this my Codicil to be annexed to the ſame, give him one other ſum of 100l.

Whereas in the former part of this my Will I have given A. B. 100l. now, on further conſideration, and finding my circumſtances better than I thought them, I give him an additional ſum of 100l.—See P. 62.

It is common to add to the end of a Will a general clauſe of revocation to the following effect: "And I do hereby revoke and make void every other Will and Wills at any time heretofore by me made, and do declare this to be my laſt Will and Teſtament.—In witneſs whereof, &c." as before.

RESIDUE—P. 62.

All the reſt of my perſonal eſtate I give to William Morgan, whom I do nominate and appoint ſole executor of this my laſt Will.

All the reſt of my perſonal eſtate I give to A. and B. to be divided equally between them; but in caſe of the death of either before me, I give the whole to the ſurvivor—And I do nominate and appoint Richard Jones, to whom I have herein above given 100l. to be ſole executor of this my laſt Will.

The ſurplus of my perſonal eſtate, after debts and legacies paid, I order and deviſe to be diſtributed according to the ſtatute of diſtributions, meaning that my wife ſhall take the accuſtomed part thereof—See P. 18.

The reſidue of my perſonal eſtate I give to R. whom I here nominate and appoint ſole executor, &c.—and further it is my Will, that altho' the ſaid R. ſhall not chooſe to take on him the office of executor, that he ſhall notwithſtanding and nevertheleſs be entitled to the reſidue here deviſed him.

TRUSTS—P. 64.

I give to A. 100l. in truſt nevertheleſs, and to the intent that he ſhould apply the intereſt ariſing therefrom towards the maintenance of B. and alſo that he ſhould from time to time apply ſuch part of the principal thereof as may to him ſeem neceſſary to any purpoſes uſeful to the ſaid B. as towards putting him out apprentice, keeping him at ſchool, maintaining him in ſickneſs, and the like—and on this further truſt that he ſhall, on the ſaid B.'s attaining the age of 21, pay to him

the principal, or ſuch parts of it as have not been diſpoſed of in the ſervice of the ſaid B. And if it ſhould happen that the ſaid A. dies before me, I deviſe the ſaid ſum of 100 l. to the father, or in caſe of the father's death, to the guardian of B. on the truſts herein before mentioned.

I give A. 500 l. on truſt to pay the intereſt ariſing therefrom to Jane Pall for her ſole and ſeparate uſe, free from the controul of her preſent or any future huſband, her receipt for the ſame to be a ſufficient diſcharge to the ſaid A.—and on this further truſt to pay the principal to ſuch perſon or perſons, and for ſuch uſes, as the ſaid Jane ſhall by Will, or any writing in nature of a Will, appoint, my meaning being that the ſaid Jane ſhall not have any power to ſpend the principal, but only the intereſt ariſing from the ſaid 500 l. and if ſhe ſhall not by Will, or writing in nature of a Will, appoint the whole or any part of the ſaid 500 l. then my deſign is, that any unappointed parts, or the unappointed whole, ſhall go to, and be diſtributed amongſt, the next akin of the ſaid Jane according to the ſtatute, but excluding her preſent or any future huſband from all benefit from the ſaid ſum of 500 l.

I give my freehold eſtate at R. to John Bell and his heirs, upon the truſts nevertheleſs hereinafter mentioned; that is to ſay, that he ſhall, out of the rents and profits of my ſaid eſtate, pay the yearly ſum of 40 l. to Richard Ward, for and during the term of his natural life, by two half-yearly payments, the firſt to commence and become due at the end of one year from my death, the other on the expiration of half a year from that time—and on this further truſt, to apply the reſidue of the rents and profits towards the maintenance and education of J. R. and, in truſt as to ſuch ſurplus as ſhall remain after payment of the annuity and maintenance of the ſaid J. R. to place it out on government or other ſecurity, to accumulate until the ſaid J. R. ſhall attain the age of 21 years, and at that time in truſt to pay the produce thereof to him—and if at any time or times, prior to the ſaid J. R.'s attaining the age of 21 years, it ſhall be needful, towards his advancement in life, to apply for his uſe any ſum or ſums which the rents and profits of the current year, after payment of the aforeſaid annuity, ſhall not equal, my will is, that my aforeſaid truſtee ſhall apply ſuch ſum or ſums out of the then ſavings as may be neceſſary for ſuch purpoſes. If the above-named J. R. ſhall happen to die before he attains the age of 21, then and in ſuch caſe it is my will that my ſaid truſtee ſhall diſtribute the aforeſaid ſurplus and the produce thereof, or as much thereof as may remain unapplied, towards the advancement of the ſaid J. R. amongſt his next akin, unleſs he ſhall have made a teſtamentary diſpoſition of the ſame at years of diſcretion, and then and in ſuch caſe my ſaid truſtee ſhall pay it to ſuch perſon or perſons as he ſhall have deviſed it to.

The deviſe then might go on—At Richard Ward's death the 40 l. per annum to be applied to the ſame uſes as the other rents and profits—On J. R.'s leaving iſſue on dying under 21, they to have the rents, &c. The legal eſtate to be given to himſelf and his heirs, on his attaining 21, ſubject to the annuity—To his iſſue, if he die under 21, on the death of the annuitant, &c. &c.

RECOM-

RECOMMENDATIONS—P. 66.

If the teſtator means merely to give a power of appointment, and no diſcretionary right of retaining or not retaining the property to the deviſee's ſelf, his heirs, or executors, let him clearly create a power, and nothing more—for which ſee infra.—I am for the preſent ſuppoſing a diſcretion to give or not to give to the objects pointed out in the recommendation.

My eſtate in Blackacre I deviſe to A. and his heirs, meaning by this my deviſe to him to give him an intereſt in fee ſimple, totally diſburthened of all truſt whatever, notwithſtanding the recommendations hereinafter contained, which are as follows ———But all theſe matters I truſt ſolely and entirely to his diſcretion, which I will ſhall be uncontrouled by any court of law or equity whatever—meaning to convey him hereby an uncontrouled and unincumbered fee ſimple.

GUARDIANS.

And I appoint my dear wife guardian to all my children for ſuch time as ſhe ſhall continue my widow; and in caſe of her marriage, I then appoint A. their guardian from that time to their ſeverally attaining the age of 21.

I nominate and appoint B. guardian of my ſon Charles until he attain the age of 21.

Whether by Will or Deed, two witneſſes are neceſſary.

POWERS OF APPOINTMENT—P. 75.

Alſo I give my wife the further ſum of 600l. which it is my will that ſhe ſhall diſpoſe of amongſt all and every the children of our marriage, either by Will in writing, atteſted by two witneſſes, or by any Deed or Deeds in her life-time, under her hand and ſeal, in preſence of two witneſſes at the leaſt, and in ſuch ſhares and proportions as to my ſaid wife ſhall ſeem good. And if it ſhould happen that either at the time of my death or afterwards, during the life of my wife, any of our ſaid children ſhall be dead, leaving iſſue, I do hereby authoriſe my ſaid wife to appoint unto one or more of the ſaid iſſue, any portion of the ſaid 600l. which my wife ſhall think proper; but I do leave it entirely at the option of my wife to appoint, or not to appoint, any ſum to the iſſue of ſuch child or children ſo dying, and in default of appointment by my ſaid wife of the whole or part of ſuch ſum of 600l. I give the ſame, on the death of my wife, equally amongſt all our children, ſhare and ſhare alike, the iſſue of any child or children deceaſed at the time of the death of my wife to be entitled to the ſhare of ſuch child or children, in ſuch manner and proportions as they would take under the ſtatute of diſtributions in caſe of the death of ſuch child or children without making a Will.

I, Elizabeth Jackſon, having, under the Will of my late huſband, John Jackſon, a power of appointing 600l. amongſt our children, &c. do give, in virtue and by force of the ſaid power, 100l. to Ann Jackſon, 50l. each to Jane and Elizabeth Harcourt, iſſue of our daughter, Elizabeth Harcourt, deceaſed, &c. &c.

I give my nephew, George Roberts, the ſum of 2000l. willing that he ſhall diſpoſe of the ſame either by his laſt Will and Teſtament, ſigned by him in preſence of two witneſſes, or by any Deed or Deeds in his life-time, under his hand and ſeal, in preſence of two witneſſes, to and amongſt ſuch of his iſſue lawfully begotten as to him ſhall ſeem good, it being my will that the whole 2000l. ſhall go to his deſcendants, but that he ſhall at his diſcretion give it to one or more of them, or to all which may be living at his death—76—and in default of appointment by the ſaid G. Roberts, or as to any unappointed or illappointed reſidue, I give the aforeſaid 600l. or the unappointed or illappointed part thereof, on the death of G. R. equally amongſt his iſſue; that is to ſay, with this reſtriction, that the iſſue of any of his children which may be dead ſhall take no more amongſt them than the ſhares of ſuch children would have amounted to, the iſſue of each child to take in ſuch way as if ſuch child had come into poſſeſſion of his or her ſhare, and died inteſtate, whereby the ſame would be diſtributable, nor ſhall the iſſue of any child living at the deceaſe of the ſaid G. R. take any thing.

Whereas I, G. R. am empowered, under the Will of my late uncle, A. to diſpoſe of the ſum of 2000l. amongſt one or more of my iſſue as ſhall to me ſeem good; in virtue and by force of ſuch power, I do give to my daughter Tabitha, 200l. I give to my ſon George, 500l the reſidue and remainder of the ſaid ſum of 2000l. I give to be equally divided, ſhare and ſhare alike, amongſt all the children of my ſaid daughter Tabitha and my ſaid ſon George, which ſhall be living at my death—77.

I give my daughter Ann the ſum of 1500l. which it is my will ſhe ſhall diſpoſe of, &c. to one or more, or all her children, as to her ſhall ſeem good.

I deviſe to A. B. and his heirs, my freehold eſtate at Blackacre, which it is my will that he ſhall diſpoſe of by Will, &c. or Deed, &c. to any one or more of his children or iſſue, as to him ſhall ſeem good.

If there is a power of appointing to children, a deviſe of this ſort is good—80: "I give to my daughter Ann 1000l. in truſt to pay the profits and dividends to Henry Hobart, her huſband, during his life, and after his deceaſe my ſaid daughter Ann, if ſhe ſurvive him, ſhall have the principal itſelf."

I ſhall ſubjoin a ſhort Will, in which ſeveral of the points relative to powers are noticed.

FORM

FORM OF A WILL.

I A. B. of —— in the County of —— do make this my laſt Will—I give to M. my dear wife, 500l. and alſo my houſehold furniture, (uſing that word in its moſt ample ſignification) my books, and philoſophical inſtruments—The reſidue of my perſonal property I give to C. D. and E. F. whom I hereby make executors to this my laſt Will, in truſt to pay the annual intereſt and produce thereof to my aforeſaid wife, to her ſole and ſeparate uſe during her life; alſo on this further truſt, to apply ſuch parts of my ſaid perſonal fortune as my aforeſaid wife ſhall, by writing under her hand during her widowhood, appoint to the uſe of any one or more of my children by my ſaid wife, or their iſſue, whether for maintenance, education, apprentice fee, marriage portion, or any other occaſion, ſuch as ſhall ſeem good to my ſaid wife. But in caſe of the ſecond marriage of my ſaid wife, I, from that time, devolve this power of appointing ſuch ſum or ſums of money as from time to time the neceſſities of my children or their iſſue ſhall require, on C. D. and E. F. my executors aforeſaid, hereby authoriſing them, by writing under their joint hands, to apply whatever money may from time to time ſeem to them good, to the above or other ſuch purpoſes. My will further is, that after the death of my ſaid wife (provided ſhe never marry again) my ſaid truſtees ſhall, at ſuch periods, and in ſuch ways, and under ſuch limitations as my wife ſhall appoint, pay to one, or all, or ſome of my children, or the iſſue of my children, ſuch ſum or ſums as my wife, by writing under her hand and ſeal, or by will ſigned in the preſence of two witneſſes, ſhall appoint; and in default of ſuch appointment, or as to any reſidue which any appointment ſhall not reach, I give what may remain of my perſonal eſtate to and amongſt all my children and their iſſue which ſhall be alive at the death of my ſaid wife equally, (i. e. regard being had to ſums already received by them, which caſe is eſpecially provided for below) meaning that the iſſue of children then alive ſhall take nothing—and the children then alive, together with the iſſue of thoſe dead, to take equally *per ſtirpes*, i. e. the whole number of deſcendants of any child deceaſed to ſtand in his or her place, and to take his or her ſhare equally amongſt them. And as it is my intention that this unappointed part of my fortune ſhall be divided in the way moſt beneficial to my family, I deviſe that all ſums which may have been appointed out of the principal of my property to any child under this Will, ſhall be conſidered at the time of a diſtribution of the unappointed reſidue, ſo that no child, or child's child, &c. ſhall take more in addition to what has been received, than what, with the ſum ſo received, will be equal to the ſum received and to be received by any other of my iſſue ſimilarly ſituated to a child ſo taking—And any child poſſeſſing the whole or part of an eſtate limited to my iſſue in remainder under my father's Will, ſhall not receive, under a diſtribution of the unappointed part, more in addition to ſuch property than he would have received in addition to it had it come to ſuch child under the powers of this Will. But in caſe of the ſecond marriage of my wife, I from that time transfer

all

all power of appointing the diſpoſition of my effects as above after the death of my ſaid wife, from her to my executors and truſtees, C. D. and E. F. aforeſaid, the reſidue, if any, on default of their appointment, to be ſhared out as in caſe of default of appointment by my ſaid wife. In caſe of the death of either of the above truſtees and executors, either before or after my own, I empower the ſurvivor, by Deed under his hand and ſeal, to appoint a co-truſtee, to whom I give all the powers in this Will granted to the original truſtees and executors, and whenever at any time there ſhall be only one truſtee in being, I empower him to conjoin with him any other perſon, by Deed under his hand and ſeal, ſuch other perſon to enjoy, to their full extent, all the powers herein granted to the original truſtees and executors. And if my wife ſhall happen to die in my life-time, I give to my ſaid truſtees, or the ſurviving one, in caſe of the death of the other, all the powers of appointment given to my wife, together with the power of chooſing a co-truſtee on every event of there being but one as before—they both joining in any inſtrument in writing by which an appointment is made—provided that, in ſuch caſe, a final appointment of the principal and accumulation of intereſt, if ſuch there be, ſhall be made within one month of my youngeſt child attaining the age of 21; and in default of appointment in that period, my will is, that the whole be then diſtributed in the proportion and under the diviſions contained above, in caſe of the death of my wife without making an appointment.

I give the guardianſhip of all my children to my wife during the time ſhe ſhall be my widow, and on her marriage I transfer it to my truſtees for the time being, till the period at which they ſhall ſeverally attain the age of 21.

To this my laſt Will I ſet my hand and ſeal this —— day of —— in the year of our Lord ——

Signed, ſealed, publiſhed, and declared as and for the laſt Will of the above-named A. B. in our preſence.

NAMES of CASES.

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